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Commentaries on the Common Law

1856

Sub. — Law And Legislation / Common Law

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TO

RICHARD BETHELL, M.P.

HER MAJESTY'S SOLICITOR GENERAL,

THE COUNCIL OF LEGAL EDUCATION,

WHO,

TO THE HIGHEST FORENSIC EMINENCE,

UNITES

IGUISHED REPUTATION AS A LAW REFORMER,

THESE COMMENTARIES,

WRITTEN IN THE HOPE OF PROMOTING THE STUDY AND SPREADING A KNOWLEDGE OF

The Law,

ARE, WITH PERMISSION, RESPECTFULLY DEDICATED

BY

THE AUTHOR.

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PREFACE.

THIS Work has been written with a view to filling what has long appeared to me a void in Legal Literature, its aim being to present explanatory comments on the Law, illustrated by Cases, selected in sufficient number and with sufficient care, to enable the reader to pursue for himself in detail the matters debated or touched upon in the text. In the choice of topics for discussion, I have been guided in part by an examination of Standard Treatises, but yet more materially by an experience of three years devoted almost exclusively to the delivery of Lectures upon the leading branches and departments of our Common Law. Whilst thus engaged in tracing out its principles and indicating its practice, my attention has been perpetually directed to points of difficulty or interest, imperatively needing elucidation, which had previously escaped my notice; on all such points, which, as they presented themselves, were from time to time scrupulously noted down, I have in the ensuing pages attempted more or less fully to throw light. But besides this, I have, during the period referred to, necessarily applied myself to a diligent scrutiny of decided cases

and to the task, by no means light or easy, of choosing therefrom such as seemed specially adapted for educational purposes, for assisting towards the interpretation of important statutes, or for fixing in the mind a knowledge and correct apprehension of legal axioms and doctrines. Of such cases many have been abstracted in the text of this Work; others have been suggested for perusal in the notes, wherein also decisions of minor importance have throughout been so far arranged and classified, that they may readily be consulted in such manner as virtually to amplify the scope and proportionately to extend the usefulness of the Volume. To him who has not, before opening it, seriously concerned himself with the study of the Law, I would offer one suggestion, that, avoiding technicalities and details, he should in the first instance familiarise himself with its more inviting portions, particularly with the Introductory Chapter of each Book, and with the sub-divisions of Book I., in which the nature of Legal Rights, enforceable by action, and of Extraordinary Remedies, is treated of(*a*).

In these days of legislative activity and legal change, special difficulties have to be encountered by a professional writer. On him, perchance, is cast the duty of interpreting enactments which have not previously been judicially considered, or of re-shaping, re-modelling, and re-arranging his

(*a*) The reader should perhaps be apprised, that the Law of Landlord and Tenant is excluded from consideration in the present Volume; an excellent elementary work on that subject having very recently appeared from the pen of the late learned Mr. J W. Smith, edited by Mr. Maude.

materials when they had well nigh been finally adjusted. By such difficulties I have found myself much embarrassed; the greatest of them, however, occasioned by the passing of the Common Law Procedure Act, 1854, has, I trust, been wholly surmounted by a delay in printing some portion of the manuscript affected by it—a delay which eventually necessitated the interpolation of lettered pages towards the end of Book I. That particular part of the Volume just referred to, extending from p. 112 to p. 256 *u*, has been prepared by my friend Mr. Philip Francis, of the Middle Temple (already favourably known to the Profession by his "Common Law Procedure"), who has devoted to it several months of the most patient and unsparing labour. For the assistance thus rendered, I would here express my acknowledgments; of its value, after careful examination—especially of the remarks on Pleading and the Practice connected therewith—I am fully sensible.

With one word more, I may conclude. If it be true that Law is really worthy to be called a Science—if it be true that Lex est RATIO MENSQUE SAPIENTIS ad jubendum et ad deterrendum idonea—if, further, we are justified in affirming that potius ignorantia juris litigiosa est quam scientia—is it indeed vain or inexpedient to hope that a sound knowledge of Legal Principles may gradually be desiderated by and spread amongst the educated classes of this Country? Is it futile or unwise to predicate that much and enduring good would thence result? As regards myself, whose main incentive to the preparation of these Commentaries has

been a desire to facilitate the attainment of such end, the consciousness of having done so—in any, the slightest, degree—would amply compensate for past labours.

HERBERT BROOM.

TEMPLE,
December 15*th*, 1855.

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10, n. (*c*), *for* Lord *Brougham*, *read* Lord *Truro*.

44, As to an agreement 'to oust the jurisdiction of the Courts,' see *Livingston* v. *Ralli*, 24 L. J., Q. B., 269.

47, *l.* 4, *for* an action *read* actions.

52. The right of appeal from the decision of the Court upon a motion is now given in certain cases by the C. L. Proc. Act, 1854, ss. 34 *et seq.*

86 (*g*), *add reference to Rolin* v. *Steward*, 14 C. B. 595, cited *post*, p. 858 (*o.*)

99, n. (*u*), *after M'Kinnon* v. *Penson*, 8 Exch. 319, *add* S. C. (in error), 9 Exch. 609.

270, n. (*q*), *add reference to* Judgm. *Buckland* v. *Johnson*, 15 C. B. 164.

277, *l.* 9, *dele* 'usually.'

287, *l.* 16, *the inverted commas should be inserted after the word* 'facts.'

291, n. (*y*), *add* S. C. (in Error), 6 Bing, N. C. 324, with which compare *Feret* v. *Hill*, 15 C. B. 207, cited at p. 375, n. (*f*).

301, n. (*h*), *after reference to Fisher* v. *Bridges*, 2 E. & B. 118, *add* S. C. reversed in error, 3 E. & B. 642, cited at p. 364.

322. As illustrating the nature of a good 'consideration' for a promise, see *Cooper* v. *Parker*, 14 C. B. 118.

361, n. (*v*), *add reference to Taylor* v. *The Crowland Gas & Coke Co.* 10 Exch. 293.

365, n. (*l*), *for* 1 H. L. Cas. *read* 4 H. L. Cas.

368. As to contracts in restraint of trade, see *Hilton* v. *Eckersley*, 24 L. J., Q. B., 353.

438, n. (*g*), *add reference to Roffey* v. *Henderson*, 17 Q. B. 574.

458, *l.* 6, *for* now *read* more.

494, n. (*n*), *add reference to Parr* v. *Jewell*, 16 C. B. 684.

497, n. (*e*), *add reference to Fitch* v. *Jones*, 24 L. J., C. B., 293.

519, n. (*e*), *add reference to Cuthbert* v. *Cumming*, 10 Exch. 809.

564, *l.* 18, *for* leader *read* lender.

576. The judgm. in *Clarke* v. *The Cuckfield Union* is supported by *Henderson* v. *The Australian Royal Mail Steam Packet Co.*, 24 L. J., Q. B., 322. See *Smart* v. *The Guardians of the West Ham Union*, 10 Exch. 867, 875.

615. As to contracts with alien enemies, see *Clementson* v. *Blessig*, 11 Exch. 135, and a learned note thereto appended by the Reporter; *Exposito* v. *Bowden*, 24 L. J., Q. B., 210.

653, *Hadley* v. *Baxendale* is cited and recognised in *Fletcher* v. *Tayleur*, 17 C. B. 21.

672, n. (*o*), *add reference to The Midland R. Co.* v. *Daykin*, 17 C. B. 126.

673, n. (*p*). *Lygo* v. *Newbold* is reported in 9 Exch. 302.

687. *The marginal note,* "Lord Campbell's Act," *should be transferred to l.* 4 *from bottom.*

712, n. (*n*), *add reference to Simpson* v. *Eggington*, 10 Exch. 845, 849.

729, n. (*c*), *add reference to Derecourt* v. *Corbishley*, 24 L. J., Q. B., 313.

873, n. (*p*), *for* Chap. 2, *read* Chap. 3, s. 1.

The attention of the Reader is particularly requested to the Addenda infra, necessitated by very recent Statutes :—

162. A form of Writ of Summons adapted to the proceedings under the 18 & 19 Vict. c. 67 (An Act to facilitate the Remedies on Bills of Exchange and Promissory Notes, &c.), is provided thereby (Sched. A).

505. By the 18 & 19 Vict. c. 111 (An Act to amend the Law relating to Bills of Lading), s. 1, it is enacted, that "Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement shall have transferred to and vested in him *all rights of suit,* and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself."

In connection with the remarks as to the liability of Public Companies and Partners, at pp. 142, 555 *et seq.*, the provisions of "The Limited Liability Act, 1855" (18 & 19 Vict. c. 133), should be consulted.

BENGAL SECRETARIAT LIB

COMMENTARIES

ON

THE COMMON LAW.

BOOK I.

OF LEGAL RIGHTS AND REMEDIES.

IN this Book I propose to inquire into the nature of Legal Rights and Remedies, that is, of rights which may be investigated, and remedies which may be applied, in Courts of law. During the prosecution of this inquiry, I shall, indeed, necessarily have to diverge occasionally from the direct road, in order that some collateral matters of much interest and importance may be,—if not considered with the attention which they deserve,—at all events, suggested for further examination, and partially explained.

I have commenced, then, with a definition and a brief statement of the component elements of Common Law. I have then proceeded to sketch out the history of our Superior Courts of law, to define the actual boundaries of their jurisdiction, and to offer some remarks touching their constitution, and generally as to the mode in which business is conducted in them. With a view to rendering this part of my subject more complete, I have in a separate section briefly indicated the extent of jurisdiction exercised by the County Courts.

In the Third Chapter of this Book I have examined at some length the characteristics of actionable wrongs or

injuries; I have explained their nature, and shewn how a line may be drawn, separating apparent and primâ facie merely from real rights of action. I have, moreover, pointed out various classes of cases in which our law, influenced by weighty considerations, declines to give redress, even though positive damage has been caused to an individual by the tortious act or negligence of another. It may be well to add, with reference to this part of my subject, that a classification of rights of action, more minute and philosophical than has been here thought necessary, will be attempted, when I come to treat, in the Second and Third Books of this work, of Contracts and of Torts respectively. I conceive it to be essential, however, at the very outset of Commentaries, however elementary, upon our Common Law, to give some idea of the nature of a legal injury and of a right of action, and to afford some insight into the principles which affect it.

The Fourth Chapter of this Book has been devoted to a concise view of the Proceedings in an Action at Law from the first issuing of the writ of summons down to final judgment and execution thereupon, together with a notice of the mode of Procedure in the County Courts; and in the Fifth and concluding Chapter, I have inquired concerning the nature and applicability of those extraordinary remedies which are sometimes afforded by our law in lieu of, concurrently with, or in addition to, Redress by Action.

CHAPTER I.

COMMON LAW—WHAT—OF WHAT ELEMENTS COMPOSED.

MUNICIPAL LAW in its highest and widest sense comprises all those rules, written or traditionary, which have been laid down for the guidance of the community, and to which its members must, if they would avoid penal consequences or civil liabilities, more or less stringently devised, necessarily conform. Municipal law.

The word 'law,' indeed, ex vi termini, implies a sanction(*a*). Laws must be imposed by some adequate power(*b*), and in civilised communities, at all events, they are in theory certain and determinate, for *misera est servitus ubi jus est vagum aut incertum* (*c*). According to a well-known definition, municipal law is, in such communities, "a rule of civil conduct prescribed by the supreme power in a state commanding what is right, and prohibiting what is wrong"(*d*).

The term 'common law' will be used in this volume to signify that particular portion of municipal law which is administered by the common law tribunals. It is composed of two elements or materials, the *lex scripta*, and the *lex non scripta*. Common law.

The *lex scripta* comprises the statute law of the land, the Lex scripta

(*a*) "Law" is defined as "anything laid down sc. as a rule of action, a rule imposed, fixed, or established, decreed or determined:" Richardson Dict. ad voc.

(*b*) Quod quisque populus ipse sibi jus constituit, id ipsius proprium civitatis est, vocaturque jus civile, quasi jus proprium ipsius civitatis. I. 1. 2. 1; Dig. 1. 1. 9.

(*c*) 4 Inst. 246.

(*d*) 1 Bla. Com. 44; 1 Kent, Com. 7th ed. 493.

—how construed.

duty of interpreting which devolves upon the Judges, who are guided in such interpretation by various recognised rules or canons of construction, of which the primary, or, as it has been called, the "golden" rule, is to give all the words of a statute their plain ordinary meaning, unless absurdity or injustice would be caused by so doing(*e*).

The rule, says *Parke*, B., in *Perry* v. *Skinner*(*f*), by which the Court is to be guided in construing Acts of Parliament, is to look at the precise words used, and to construe them in their ordinary sense, unless this construction would lead to any absurdity or manifest injustice; and if it should, so to vary and modify the words as to avoid that which it certainly could not have been the intention of the legislature to effect.

So, in the recent and important case of *Miller* v. *Salomons*(*g*), we find the same learned Judge observing, that words which are plain enough in their ordinary sense may, when they would involve any absurdity, or inconsistency, or repugnance to the clear intention of the legislature, to be collected from the whole of the Act or Acts in pari materiâ to be construed with it, or from other legitimate grounds of interpretation, be modified or altered so as to avoid that absurdity, inconsistency, or repugnance, but no further; for then the Court may predicate that the words never could have been used by the framers of the law in their ordinary sense, and the strict grammatical construction will bend to the obvious intention of the legislature(*h*).

It would seem, however, according to some authorities, that the application of this rule must be confined to cases

(*e*) Per *Jervis*, C. J., *Castrique* v. *Page*, 22 L. J., C. P., 146; Judgment, *Macdougall* v. *Paterson*, 11 C. B. 769.

(*f*) 2 M. & W. 476.

(*g*) 7 Exch. 546.

(*h*) See also per *Pollock*, C. B., *Waugh* v. *Middleton*, 8 Exch. 357; per *Maule*, J., *Arnold* v. *Rigge*, 22 L. J., C. P., 240.

where the "incongruity" or "absurdity" in question arises manifestly within the particular enactment, ex. gr., so as to render it nugatory or self-contradictory; and that the Court cannot construe plain and unambiguous words in other than their literal and ordinary sense, merely because, in their opinion, such a construction may lead to "an absurdity," or even to "manifest injustice" (*i*), though it is admitted that "words may be modified or varied where their import is doubtful or obscure" (*k*).

The embarrassment so often experienced in applying the "golden" rule for the interpretation of Acts of Parliament results, of course, from the difficulty of keeping within the line which, under our administrative system, separates the office of *declaring* the law from that of *making* it.

In theory, the distinction just adverted to is clear and well marked; in practice, it is difficult to observe,—*judicis est jus dicere, non jus dare.* It is the province of the statesman, and not of the lawyer, to discuss, and of the legislature to determine, what is best for the public good, and to provide for it by proper enactments. It is, as remarked in a late case, the province of the Judge to expound the law only: the written, from the statutes; the unwritten law, from the decisions of his predecessors and of the existing Courts, or from text writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference; it is not, however, the duty of a Judge to speculate upon what may be the best in his opinion for the advantage of the community (*l*).

(*i*) See the judgment, *Abley* v. *Dale*, 11 C. B. 390, with which acc. *Woodward* v. *Watts*, 22 L. J., M. C., 149, 151. See also, per Lord *Denman*, C. J., *Green* v. *Wood*, 7 Q. B. 185.

(*k*) Judgment, *Abley* v. *Dale*, supra.

(*l*) Per *Parke*, B., *Egerton* v. *Earl Brownlow*, 4 H. L. Ca. 123.

With a view to ascertaining the intention of the legislature in framing the provisions of a statute, our Judges are guided, as I before said, by recognised rules, some of the more important of which are specified in *Heydon's case* (*m*), to the following purport and effect:—that in all statutes, be they penal or beneficial, restricting or enlarging of the common law, four things are to be considered, viz. 1. What was the common law before the making of the Act (*n*); 2. What was the mischief and defect against which the common law did not provide; 3. What remedy the Parliament hath resolved and applied to cure the disease of the commonwealth; and, 4. The true reason of the remedy (*o*). And, having satisfied themselves with reference to these various points, it is the duty of the Judges to make such construction as shall "suppress the mischief and advance the remedy (*p*), putting down all subtle inventions and evasions for continuance of the mischief, et pro privato commodo; and adding force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico."

To the rules just stated, I will here merely, by reason of its great practical importance, add one other, viz. that a statute must in general, on principles of obvious convenience and justice, be construed as prospective, and not as retro-

(*m*) 3 Rep. 7. These rules are explained and illustrated in Dwarr. Stats., 2nd ed., 563 et seq. See also *Miller* v. *Salomons*, 7 Exch. 522; Judg. *Salkeld* v. *Johnson*, 2 Exch. 273; per *Coleridge*, J., 11 Q. B. 579.

(*n*) Per *Pollock*, C. B., 2 Exch. 332.

(*o*) The Court will, therefore, when necessary, look at the preamble of the Act. Per *Tindal*, C. J., *Sussex Peerage case*, 11 C. & F. 143; per Sir *J. Nicholl*, *Brett* v. *Brett*, 3 Addams, 210; *Stowel* v. *Lord Zouch*, Plowd. 369; per *Buller*, J., *Crespigny* v. *Wittenoom*, 4 T. R. 790. The title of an Act has occasionally been referred to as aiding in its construction; but "it is certainly no part of the law, and, in strictness, ought not to be taken into consideration at all:" Judg. 2 Exch. 283.

(*p*) See per *Parke*, B., 2 Exch. 273.

spective, in its operation; it must be considered as intended to regulate the future conduct of persons, and not to apply to past transactions. But even this elementary rule is one of construction only, and will yield to the intention of the legislature if sufficiently expressed (*q*).

Lex non scripta.

The *lex non scripta* is an unwritten law, comprising those principles, usages, and rules of conduct, applicable to the government and security of person and property, which do not depend for their authority upon any existing express and positive declaration of the will of the legislature. It comprises, and mainly consists of, 'customs,' whether general or particular, and has been often called the 'customary law' (*r*). These customs date from a remote antiquity (*s*), and are in some instances believed to have originated from Acts of the legislature of which no trace or record now remains. It has, therefore, been justly said, that the *lex non scripta* consists of those rules and maxims concerning the persons and property of men which have obtained by the tacit assent and usage of the inhabitants of this country, and have the same force and authority as Acts of Parliament. The only difference between the two being, that the consent and approbation of the people with respect to the one is signified by their immemorial use and practice, whereas their approbation of, and consent to, the other, is declared by Parlia-

(*q*) Per *Parke*, B., *Moon* v. *Durden*, 2 Exch. 22, 43; per *Rolfe*, B., *Att.-Gen.* v. *Marquis of Hertford*, 3 Exch. 687; *Pettamberdass* v. *Thackoorseydass*, 7 Moo. P. C. Cas. 239; *Waugh* v. *Middleton*, 8 Exch. 352; *Reg.* v. *Leeds and Bradford R. C.*, 21 L. J., M. C., 193; per Ld. *Campbell*, C. J., *Leary* v. *Patrick*, 15 Q. B. 271; Leg. Max., 2nd ed., p. 28. The General Rules relating to the Construction of Statutes are collected in Dwarr. Stats., 2nd ed., chap. 9; 1 Kent, Com., 7th ed., 509 et seq.; Leg. Max., 2nd ed., Index, tit. "Statutes."

(*r*) See 1 Bla. Com. 68.

(*s*) "The law and custom of England is the inheritance of the subject, which he cannot be deprived of without his assent in Parliament:" 12 Rep. 29.

ment, to whose enactments every member of the community is considered as virtually a party (*t*).

Although, in all probability, it is only partially true, that our customary or unwritten law flows from the express act or sanction of the supreme power, yet it may be curious to remark that something very similar, or, at all events, analogous to such a mode of derivation, has actually occurred almost within living memory in the United States of America, where it is an established doctrine, that English statutes passed prior to the Declaration of Independence, or, at all events, to the emigration of the forefathers of the American people, so far as applicable to their institutions, must be taken to constitute a part of the common law of that realm (*u*). This proposition has been broadly laid down by some of the most eminent judges of the United States, and will serve to illustrate the manner in which the statute law or lex scripta of a country, though ceasing to be operative as such, may become blended with or even form an integral and ascertainable portion of its unwritten law.

General customs.

Customs, as already intimated (*x*), may be either *general* or *particular*. As referable to general customs, properly so called, Sir W. Blackstone specifies (*y*) that rule of law which settles the course in which lands descend by inheritance; that rule which prescribes the solemnities and obligation (*z*) of contracts; which declares the principles applicable to the expounding of wills, deeds, and Acts of Parliament; which indicates the respective remedies for civil injuries. Doctrines such as these, he remarks, are not set down in any written statute or ordinance, but depend merely upon immemorial usage for their support.

(*t*) 1 Bla. Com. 64, 68.
(*u*) 1 Kent, Com., 7th ed., 523-4.
(*x*) Ante, p. 7.
(*y*) 1 Com. 68.
(*z*) As to the obligatory force of contracts, see post, Book II.

It is here to be observed, on the one hand, that the lex non scripta might, in some imaginable cases, control the statute law, as if that law were against common right and reason, or repugnant, or impossible to be performed (*a*). And, on the other hand, it is noticeable that our customary law will, in many cases, nullify the acts and contracts of individuals, and will even interfere with the dispositions which they may make of their private property. "A man," for instance, "cannot alter the usual line of descent by a creation of his own" (*b*). He cannot give an estate in fee simple to a person and his heirs on the maternal side, because the law has already said how a fee simple estate shall descend. In this case, the law does not allow of a capricious disposition of property, and still less will it sanction the attaching of any condition to property which is against the public good. Thus, a case occurs in the old books of a man making a condition that his devisee should not cultivate his arable land; which is void, because it is against the prosperity of the country, and for no other reason (*b*). But although the law of England will not allow a man to indulge in every fanciful disposition of his property, it will allow him to put his estates in settlement for the purpose of providing for those who are to come after him, and, in doing so, it gives him all the rational power of disposition which he can reasonably desire. Even upon the power of disposition by settlement, it will, however, impose such limits and restraints as are required by considerations having reference to the public good: the principles which govern its decisions upon this subject being embodied in the maxim *sic utere tuo ut*

(*a*) *Dr. Bonham's case*, 8 Rep. 118 a; per *Best*, J., *Forbes* v. *Cochrane*, 2 B. & C. 471; Treat. Eq. 2; Argument, *Gorham* v. *Bp. of Exeter*, 5 Exch. 671; Dwarr. Stats., 2nd ed., 480–4.

(*b*) Per Lord *St. Leonards*, *Egerton* v. *Brownlow*, 4 H. L. Ca. 241–2.

alienum non lædas (which applies to the public in at least as full force as to individuals), and in the equally expressive maxims *nihil quod est inconveniens est licitum*, and *salus reipublicæ suprema lex* (c).

Lex mercatoria

Conspicuous amongst general customs stands the *lex mercatoria*, or law merchant (d), a branch of law deduced from the practice and customs of merchants, aided and regulated by a long series of judicial decisions, as also by the express enactments of the legislature; which has, especially of late years, exercised much vigilance in aiding fair commercial enterprise on the one hand, and in checking undue speculation on the other.

To evidence of mercantile custom, which, when established and shewn to prevail generally (e), becomes part of our common law, much weight is attached in Courts of justice; and, in illustration of this remark, I need here merely refer to the late case of *Bellamy* v *Marjoribanks* (f), which involved a very important question in connexion with common cheques or drafts on bankers, viz. as to the precise effect of crossing such instruments. At the trial of that case, (as appears from the Report), a number of the most eminent bankers, and the most experienced bankers' clerks in London, were examined as to the existence of a particular custom alleged by the plaintiff in his declaration, and denied by the defendant, and the Court, in adjudicating upon a motion for a new trial on the ground, inter alia, that the verdict was against evidence, admitted that a custom such as that contended for would be binding and obligatory upon bankers, if

(c) See per Lord *Brougham*, 4 H. L. Ca. 195.

(d) As to which see Ram, Sci. Leg Judgment, Chap 8, 1 Bla Com 273, 8 C B 967, note (a)

(e) As to customs or usages of trade prevalent in particular places, see post, p 19.

(f) 7 Exch 389.

proved; and that it might be proved "by a long, well-known, acknowledged, and universal usage and practice amongst bankers to act in accordance with it."

So, in *Brandao* v. *Barnett* (*g*), Lord *Campbell* remarks, that "the general lien of bankers is part of the law merchant, and is to be judicially noticed, like the negotiability of bills of exchange, or the days of grace allowed for their payment. When a general usage has been judicially ascertained and established, it becomes part of the law merchant, which Courts of justice are bound to know and recognise. Such has been the invariable understanding and practice in Westminster Hall for a great many years; there is no decision or dictum to the contrary; and justice could not be administered if evidence were to be given toties quoties to support such usages, an issue being joined upon them in each particular case."

Particular or local customs.

A *particular* or *local* custom may be defined to be an usage which "has obtained the force of law, and is, in truth, the binding law within a particular district, or at a particular place, of the persons and things which it concerns"(*h*). A custom, therefore, in so far as it extends, supersedes the general law (*i*).

Such, according to Blackstone (*k*), is the custom of gavelkind (*l*) in Kent and some other parts of the kingdom, which ordains, among other things, that not the eldest son only of the father shall succeed to his inheritance, but all the sons alike: and that, though the ancestor be attainted and hanged, yet the heir shall succeed to his estate without any escheat

(*g*) 3 C. B. 519, 530; *S. C.*, 12 C. & F. 787.

(*h*) Judgment, *Tyson* v. *Smith*, 9 Ad. & E. 421.

(*i*) Judgment, *Lord Falmouth* v. *George*, 5 Bing. 293.

(*k*) 1 Com. 74–5.

(*l*) See Williams' Real Prop., 3rd ed., 105.

to the lord. Such is the custom which prevails in divers ancient boroughs, and, therefore, called borough-English, that the youngest son shall inherit the estate in preference to all his elder brothers. Such is the custom in other boroughs that a widow shall be entitled for her dower to all her husband's lands, whereas at the common law she shall be endowed of one third part only. Such also are the special and particular customs of manors, of which every-one has more or less, and which bind all the copyhold and customary tenants who hold of the said manors (*m*).

Now all these, and similar special customs, being deviations from the general law of the land, are good only by virtue of long-continued usage and of that consent, on the part of such portions of the community as are more immediately affected by them, which is to be implied therefrom.

Custom—whence it dates, &c.

1. A custom, therefore, says Sir W. Blackstone, in order that it may be legal and binding, must "have been used so long that the memory of man runneth not to the contrary; so that, if any one can shew the beginning of it, it is no good custom. For which reason no custom can prevail against an express Act of Parliament, since the statute itself is a proof of a time when such a custom did not exist" (*n*).

Now legal memory dates from the 1st year of the reign of Richard I.; but it must not, therefore, be supposed that it was, even prior to the stat. 2 & 3 Will. 4, c. 71, in all cases necessary to produce evidence extending over so long a period, of the existence of a particular custom in dispute. From proof of the enjoyment of a custom for a much less period, ex. gr., for so short a time as twenty years, a jury has, in the absence of evidence to the contrary, been held justified in

(*m*) See *Richardson* v. *Walker*, 2 B. & C. 827.
(*n*) 1 Bla. Com. 76.

finding that the custom had existed immemorially (*o*). And now, where a claim "may be lawfully made," at the common law, by custom, prescription (*p*), or grant, to any right of common, or other profit or benefit to be taken and enjoyed from or upon "the land of any person," or "to any way or other easement, or to any watercourse, or the use of any water to be enjoyed or derived" upon or from the land of any person, reference will have to be made to the 1st and 2nd sects. (*q*) respectively of the statute just mentioned, which was passed with a view to "shortening the time of prescription in certain cases."

Custom must have been continued.

2. A custom must have been *continued;* because "any interruption would cause a temporary ceasing: the revival gives it a new beginning, which will be within time of memory, and, thereupon, the custom will be void. But this must be understood with regard to an interruption of the *right;* for an interruption of the *possession* only for ten or twenty years will not destroy the custom. As, if the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the custom is not destroyed though they do not use it for ten years, it only becomes more difficult to prove; but if the *right* be anyhow discontinued for a day, the custom is quite at an end" (*r*).

Where a custom has been thus 'continued' in the sense

(*o*) *Jenkins* v. *Harvey*, 1 Cr M. & R. 877; *Rex* v. *Joliffe*, 2 B. & C. 54, *Master Pilots &c. of Newcastle-upon-Tyne* v. *Bradley*, 21 L. J., Q. B, 196. See also *Duke of Beaufort* v. *Smith*, 4 Exch. 450; *Reg.* v. *Master &c. of Dulwich College*, 21 L J, Q B, 36.

(*p*) The distinction between custom and prescription is this—that custom is a local usage not annexed to any person, whereas prescription is merely a personal usage, as that S. and his ancestors, or those whose estate he has, have used time out of mind to enjoy a particular advantage or privilege: 2 Bla. Com. 263; per Cur., *Mayor of Lynn Regis* v. *Taylor*, 3 Lev. 160.

(*q*) Upon which see Mr. Shelford's notes in his ed. (5th) of the Real Prop. Stats., pp. 2, 5.

(*r*) 1 Bla Com. 77.

above assigned to that term, it, in fact, comes at last to an agreement which has been evidenced by such repeated acts of assent on both sides from the earliest times, beginning before the time of memory, and continuing down to our own times, that it has become the law of the particular place wherein it has been shewn to obtain (*s*).

—and peaceably enjoyed.

3. A valid custom must have been *peaceable*, and acquiesced in, not subject to contention and dispute; for, as such a custom derives its force and authority from common consent, the fact of its having been immemorially disputed, either at law or otherwise, would be a proof that such consent was wanting (*t*).

Custom must be reasonable

4. A custom must be *reasonable*, or, rather, it must not be unreasonable (*u*). "A custom," therefore, "may be good, though the particular reason of it cannot be assigned, for it sufficeth, if no good legal reason can be assigned against it. Thus, a custom in a parish that no man shall put his beast into the common till the 3rd of October would be good; and yet it would be hard to shew the reason why that day in particular is fixed upon, rather than the day before or after. But a custom that no cattle shall be put in till the lord of the manor has first put in his is unreasonable, and, therefore, bad: for, peradventure, the lord will never put in his, and then the tenants will lose all their profits" (*v*).

A custom, however, is not unreasonable, merely because it is contrary to a particular maxim or rule of the common law, for *consuetudo ex certâ causâ rationabili usitata privat communem legem*, as the custom of gavelkind, and borough-English, which are directly contrary to the law of descent; or, again, the custom of Kent, which is contrary to

(*s*) Judgment, *Tyson* v. *Smith*, 9 Ad. & E. 425.

(*t*) 1 Bla. Com. 77.

(*u*) 1 Bla. Com. 77; *Hix* v. *Gardiner*, 2 Bulstr. 195.

(*v*) 1 Bla. Com. 77.

the law of escheat (*x*). Nor is a custom unreasonable because it is prejudicial to the interests of a private man, if it be for the benefit of the commonwealth, as the custom to turn the plough upon the headland of another, in favour of husbandry; or to dry nets on the land of another, in favour of fishing, and for the benefit of navigation (*y*).

It is not an unreasonable custom that a tenant (*z*), who is bound to use a farm in a good and tenantable manner, and according to the rules of good husbandry, shall be at liberty, on quitting the farm, to charge his landlord with a portion of the expenses of draining land which requires draining according to good husbandry, though the drainage be done without his landlord's knowledge or consent (*a*). And a custom, that a tenant shall have the waygoing crop after the expiration of his term, is reasonable and good. "It is just; for he who sows ought to reap; and it is for the benefit and encouragement of agriculture. It is, indeed, against the general rule of law concerning emblements, which are not allowed to tenants who know when their term is to cease, because it is held to be their fault or folly to have sown when they knew their interest would expire before they could reap. But the custom of a particular place may rectify what otherwise would be imprudence or folly" (*b*).

5. A custom ought to be *certain*. And, therefore, a Custom—

(*x*) Ante, p. 11.

(*y*) Judgment, *Tyson* v. *Smith*, 9 Ad. & E. 421; *Lord Falmouth* v. *George*, 5 Bing. 286.

(*z*) As to customs of the country affecting the relation of landlord and tenant, see the remarks, post, p. 19.

(*a*) *Mousley* v. *Ludlam*, 21 L. J., Q. B., 64; *Dalby* v. *Hirst*, 1 B. & B. 224. With reference to the reasonableness of particular alleged customs, see also *Hilton* v. *Earl Granville*, 5 Q. B. 701; *Rogers* v. *Brenton*, 10 Q. B. 26; *Elwood* v. *Bullock*, 6 Q. B. 383; *Gibbs* v. *Flight*, 3 C. B. 581; *Reg.* v. *Dalby*, 3 Q. B. 602; *Le case de Tanistry*, Davys, 28 b, 34.

(*b*) *Wigglesworth* v. *Dallison*, Dougl. 201; 1 Smith L. C. 299.

must be certain.

custom that lands shall descend to the most worthy of the owner's blood, is void; for how shall this worth be determined? But a custom, that lands shall descend to the next male of the blood exclusive of females, is certain, and, therefore, good. So a custom to pay twopence an acre in lieu of tithes is good; but to pay sometimes twopence, and sometimes threepence, as the occupier of the land pleases, is bad, for its uncertainty (*c*).

On the ground of uncertainty, the following custom was held bad: viz. for all the customary tenants of a manor, having gardens, parcels of their tenements, to dig, take, and carry away from a waste within the manor, "for the purpose of making and repairing grassplots in the gardens, parcels of the same respectively, for the improvement thereof, such turf covered with grass fit for the pasture of cattle, as hath been fit and proper to be so used and spent every year, at all times in the year, as often and in such quantity as occasion" may require (*d*). "A custom," said Lord *Ellenborough*, C. J., with reference to this case, "however ancient, must not be indefinite and uncertain; and here it is not defined what sort of improvement the custom extends to." And he adds,—"there is nothing to restrain the tenants from taking the whole of the turbary of the common, and destroying the pasture altogether. A custom of this description ought to have some limit; but here there is no limitation to the custom as laid but caprice and fancy" (*e*). But a custom to pay a year's improved value by way of fine on a copyhold estate might be good, though the value is a thing uncertain; for it may at any time be ascertained, and the

(*c*) 1 Bla. Com. 78; *Le case de Tanistry*, Davys, 28 b, 35; *Blewett* v. *Tregonning*, 3 Ad. & E. 554.

(*d*) *Wilson* v. *Willes*, 7 East, 121.

(*e*) See also *Clayton* v. *Corby*, 5 Q. B. 415.

maxim of law is, *id certum est quod certum reddi potest* (*f*).

In *Broadbent* v. *Wilks* (*g*), we have an instance of a custom being held void on the two-fold ground that it was unreasonable and uncertain. There the custom claimed (so far as it need here be stated,) was, that when, and as often as the lord of the manor, or his tenants of the collieries or coalmines, sunk pits in certain freehold lands within and parcel of the said manor, for the working of the said pits, and to get coals thereout, the lord and his tenants might cast the earth, stones, &c. coming therefrom in heaps "on the land *near to* such pits," "there to remain and continue" at "his and their will and pleasure:" in giving judgment with reference to the validity of this custom *Willes*, C. J., remarked, "The objection that this custom is only beneficial to the lord, and greatly prejudicial to the tenants, is, we think, of no weight; for it might have a reasonable commencement, notwithstanding, for the lord might take less for the land on the account of this disadvantage to his tenant. But the true objections to this custom are, that it is uncertain, and, likewise, unreasonable, as it may deprive the tenant of the whole benefit of the land; and it cannot be presumed that the tenant at first would come into such an agreement." He also remarks, that every custom "must be certain, for two plain reasons: 1st, because, if it be not certain, it cannot be proved to have been time out of mind, for how can anything be said to have been time out of mind when it is not certain what it is? 2ndly, it must be certain, because every custom presupposes a grant, and if a grant be not certain it is void." The Chief Justice then observes, that,

Broadbent v. *Wilks.*

(*f*) 1 Bla. Com. 78.

(*g*) Willes, 360; *S. C.*, (affirmed in Error), 1 Wils. 63; 2 Str. 1224.

tested by the foregoing rule, the custom above set out is bad, as being neither certain nor intelligible; especially by reason of the expression 'near to' used in setting out the custom, to which expression no precise and definite meaning can be attached.

After thus pointing out the uncertainty of the alleged custom, *Willes*, C. J., proceeds to say, that all customs must be reasonable, otherwise they are void, "and certainly no custom can be more unreasonable than the present. It may deprive the tenant of the whole profits of the land; for the lord or his tenants may dig coal-pits when and as often as they please; and may, in such case, lay their coals, &c., on any part of the tenant's land, if near to such coal-pits, at what time of the year they please, and may let them lie there as long as they please;" so that "they may be laid on the tenant's land and continue there for ever, though it may be more convenient for the lord to bring them on his own land; which is absurd and unreasonable."

Customs must be compulsory;

6. A custom, though established by consent, must, when established, be *compulsory*, and not left to the option of every man, whether he will use it or no; therefore, a custom that all the inhabitants of a particular district shall be rated toward the maintenance of a bridge will be good; but, a custom that every man is to contribute thereto at his own pleasure, is idle and absurd, and indeed no custom at all (*h*).

—and consistent.

7. Customs must be *consistent* with each other—one custom cannot be set up in opposition to another; for, if both are really customs, then they are of equal antiquity, and must have been established by mutual consent, which to say of contradictory customs is absurd (*i*).

(*h*) 1 Bla. Com. 78. (*i*) Id. ibid.

8. With reference to the interpretation of customs, it will be sufficient to mention the general rule, which is, that customs, especially where they derogate from the general rights of property, must be construed strictly (*k*). They are not to be "enlarged beyond the usage" (*l*).

Customs—how construed.

Besides local customs properly so called, there are, in different parts of the country, certain *usages* existing, which, unless excluded expressly or impliedly by agreement between parties (*m*), regulate, to some extent, the relation of landlord and tenant, or affect the reciprocal rights of incoming and outgoing tenants, and are usually known as 'customs of the country.' Now, a custom (*n*) belonging to this class need not be shewn to have existed immemorially, but will be established on proof of a usage, recognised and acted upon in the particular district, applicable to farms of a like description with that in regard to which its existence is specifically asserted (*o*). A 'custom of the country,' in order that it be good, must be reasonable (as will appear by reference to some of the cases above cited), and sufficiently definite and certain.

Customs of the country.

Very similar to the local usages last mentioned, as regards their operation upon the contracts of parties, are particular *usages of trade* which exist in certain places; and, in order to be effective, must be proved by apt evidence in Courts of justice. The legal effect of these usages of trade

Particular usages of trade.

(*k*) Judgment, *Rogers* v. *Brenton*, 10 Q. B. 57; 1 Bla. Com. 78; per *Bayley*, J., 2 B. & C. 839.

(*l*) Judgment, *Arthur* v. *Bokenham*, 11 Mod. 160.

(*m*) Post, Book II.

(*n*) The word 'custom' thus used "cannot mean a custom in the strict legal signification of the word; for that must be taken with reference to some defined limit or space, which is essential to every *custom* properly so called:" per Lord *Ellenborough*, C. J., *Legh* v. *Hewett*, 4 East, 154, 158.

(*o*) Woodf. L. & T., 6th edit., 449; *Dalby* v. *Hirst*, 1 B. & B. 224, where the question was raised at Nisi Prius.

I shall notice hereafter, when treating of Mercantile Contracts. It will now suffice to say, that they cannot, in strictness, be considered as forming part and parcel of our customary law (*p*).

Lex non scripta—how declared.

As our *lex scripta* must be interpreted, so must our *lex non scripta* be declared by the Judges, whose office, as already stated (*q*), it is *jus dicere*, and whose decisions, when collected in the reports, exhibit our common law, as it has actually been applied to facts differing from each other, as well in kind as in their combinations. Judicial decisions, indeed, afford the best—oftentimes the only—evidence of what law is; and, in arriving at these decisions, the Judges allow themselves to be guided by established precedents, by fixed and recognised rules of pleading, evidence, and practice (*r*), and by the admitted maxims of the law.

In conformity with our most approved Commentators, I have mentioned maxims as one important element of our common law. Of these maxims, which embody principles of much value, when their application is rightly understood, many have been derived to us from the Roman or Civil Law; and, although it be true, as recently remarked, that this law forms no rule binding in itself upon the subjects of these realms; yet, in deciding a case upon principle, where no direct authority can be cited from our books, the Courts

(*p*) Mercantile customs seem properly divisible into three classes:—1. Customs "which *all nations* agree in and take notice of," and which are held to be part of the law of England: 1 Bl. Com. 273. 2. Customs prevailing throughout the length and breadth of this country, which also have the force of law *here*, and are in general judicially noticed, without proof. 3. Customs purely local, such as are alluded to in the text, which must be proved. See a learned note, 8 C. B. 967, and cases cited, ante, pp. 10, 11. The custom of London is certified by the Recorder: see *Westoby* v. *Day*, 2 E. & B. 605.

(*q*) Ante, p. 5.

(*r*) As to the ordinary rules of pleading, evidence, and practice, in civil cases, see post, Chap. 4.

at Westminster will listen to arguments drawn from the Institutes and Pandects of Justinian, and will rejoice if their conclusions are shewn to be in conformity with that law, which is "the fruit of the researches of the most learned men, the collective wisdom of ages, and the groundwork of the municipal law of most of the countries in Europe" (*s*).

It may be remarked, that, in this Chapter, which treats of the elements of our common law, I have omitted all mention of certain laws, which Sir W. Blackstone (*t*) includes amongst such elements, and which he designates as "particular," that is, as "adopted and used by some particular Courts" (*u*); and this omission has been made advisedly, because I propose to restrict my inquiries to that law which is administered by our Courts of Common Law, in accordance with the plan indicated in the remarks introductory to this Book.

(*s*) Judgment, 12 M. & W. 353; Hale, Hist. Com. Law, 24, adopted 1 Bl. Com. 79. In *Reg.* v. *Archbishop of Canterbury*, 11 Q. B. 649, Lord *Denman* observes, that the *canon law* forms no part of the law of England, unless it has been brought into use and acted upon in this country; and that the burden of proof rests on those who affirm the adoption of any portion of it here.

(*t*) 1 Com. 67.

(*u*) Which are specified in 1 Bl. Com. 83. The law of Parliament, although on some remarkable occasions it has been weighed and considered in Courts of law, is equally foreign to the plan and design of this Treatise. In regard to exclusive local jurisdictions, *Turner* v. *Bates*, 10 Q. B. 292, may be consulted.

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CHAPTER II.

OF COURTS OF LAW.

HAVING, in the last Chapter, shewn what our Common Law is, and set forth concisely the elements of which it is composed, I shall now proceed to inquire into the nature and constitution of those tribunals by which it is administered:—in the first place, passing under review the Origin, History, and actual Jurisdiction of our three Superior Courts, together with the mode in which business is conducted there; and, secondly, exhibiting, with brevity, the extent and limits of the Jurisdiction of our County Courts.

SECT. I. *Of the Superior Courts.*

1. *Their Origin, History, and Jurisdiction.*
2. *Mode of Procedure in Banc and at Judges' Chambers.*

1. *Origin, History, and Jurisdiction of the Superior Courts.*

At the very outset of an inquiry respecting the origin and history of our Superior Courts of Law, it becomes essential to look back for a moment at the nature of those judicial tribunals which existed here immediately prior to and at the date of the Norman Conquest, that particular epoch affording a convenient starting point, whence the proposed investigation may be prosecuted.

Adopting this plan, it will be found, that, at the period in question, the ordinary legal tribunals of most practical

importance established in this country were the County and the Hundred Courts (*a*), which institutions traced their descent from a distant age, and from tribes amongst whom the name and office of king were alike unknown; on which account, a learned writer has observed, that our common law jurisdiction may be considered as emanating from the people (*b*); and it certainly, during successive centuries, retained much of that rudeness which belonged to and was derived from a primæval and very barbarous state of society. Of the two legal tribunals which I have mentioned as existing here prior to and at the date of the Norman Invasion, we know that the Hundred Court was, in point of jurisdiction, inferior to that of the County or Shire, although it may be impossible to define with accuracy the precise boundaries and territorial limits of the Anglo-Saxon Hundred (*c*). Of this Court, it will suffice for my purpose to say, that it met once at least in each month; that it had both a civil and a criminal jurisdiction; that it was composed of the thanes and landlords whose demesnes were included within the hundred; and that it was held under the head officer or ealdorman of the particular district, assisted by the bishop of the diocese (*d*).

Hundred Court.

It was, however, in the Shire (*e*) Court, which seems to have been held twice in every year, that the principal causes were, at the time of which I now speak, heard and determined. In this Court cognisance was had of offences which concerned the crown or public, as felonies, breaches of the peace, nuisances, and the like, as well as of questions involv-

County or Shire Court

(*a*) 1 Reeves Hist. Eng. Law, 7.

(*b*) Palgr. Orig. Auth. of King's Counc. 10.

(*c*) 1 Palgr. Eng. Comm. 96.

(*d*) 1 Palgr. Eng. Comm. 98, 101.

(*e*) The shire seems sometimes to have been formed by placing one or more hundreds under the government of an earl or his deputy: 1 Palgr. Eng. Comm 117.

ing the title to land. Whilst, in all civil suits, the Shire Court appears to have had an original jurisdiction similar to that of the Hundred Court, besides an appellate jurisdiction over the subordinate tribunal (*f*).

It might perhaps reasonably have been surmised, that, whilst the country continued throughout its length and breadth in a disturbed and unsettled state, a system of administering justice by means of local courts would be found essential; and although, even in Anglo-Saxon times, the Sovereign was in theory the supreme legislator of his people, and the sole fountain of remedial justice—although, moreover, it was his peculiar prerogative to redress the defects, abuses, and corruptions of inferior tribunals—yet it does not seem that any appeal lay from the Shire or Hundred Court to the Crown, *as of right*, and at the mere will of the suitor, or save in certain specified and extraordinary cases. Thus, in the laws of King Edgar, who flourished during a portion of the latter half of the 10th century, we find the right of appeal to the King's Court thus limited and defined: *Nemo ad Regem appellet pro aliquâ lite nisi domi jure suo dignus esse vel jus consequi non possit. Si jus nimis severum sit, alleviatio deinde quæratur apud Regem.* From this and similar passages to be met with in the Anglo-Saxon and Danish laws, it seems, in accordance with the opinion of our most learned writers, that a suitor in the County Court could not appeal to the supreme tribunal, unless justice were altogether denied him in the inferior court, or unless he laboured under some disability which precluded him from suing therein, or felt specially aggrieved by the sentence

(*f*) 1 Palgr. Eng. Com. 119; Dugd. Orig. Chap. 14, (p. 29). See 2 Hall. Midd. Ages, 140. It must be remembered, that, during the period here referred to, when force was an element in most transactions giving rise to litigation, purely civil matters rarely called for adjudication.

there pronounced upon him (*g*). So completely, indeed, was a system of local administration of justice carried out in the Anglo-Saxon times, that, strictly speaking, it has been doubted whether the sovereign himself had then, unless in cases of public concern, any original jurisdiction, though we may readily believe that few princes in those days declined to exercise their judicial functions when solicited by favourites, tempted by bribery, or stimulated by cupidity and avarice (*h*).

Probably, the best view of this subject, which can be given in a few words, is presented by Sir F. Palgrave (*i*), who tells us, that "the judicial functions of the Anglo-Saxon monarchs were of a two-fold nature: the ordinary authority which the king exercised, like the inferior territorial judges, differing, perhaps, in degree, though the same in kind; and the prerogative supremacy pervading all the tribunals of the people, and which was to be called into action when they were unable or unwilling to afford redress:" the former of these functions resulting from the peculiar and immediate relation of the vassal to his superior; the latter being inherent in the kingly office and prerogative.

Norman Conquest.

When William the Conqueror was established on the throne of England, an important change in the machinery for administering justice was effected, which gradually led to the establishment of our three Superior Courts of Common Law. I allude to the introduction into this country of the office of Chief Justiciar (*k*), and the gradual centralisation of judicial power, which was effected here by the establishment of the Aula Regis or Supreme Council of the

Changes then effected

(*g*) Palgr King's Counc. 10, 11, 1 Palgr Eng. Comm. 283.

(*h*) 1 Lingard Hist Eng. 359.

(*i*) 1 Hist. Comm. 282.

(*k*) As to the nature of the functions delegated to the king's justiciars, see 1 Palgr. Eng. Comm. 289; Madox, Hist. Exch Chap 2.

sovereign,—a Court which was invested with some most important functions of a purely judicial nature.

For at least two centuries subsequent to the Norman Conquest, the history of the King's Court, a tribunal occupying the most prominent station in the government of the country, is (partly from the absence of records (*l*), and partly from their ambiguity,) involved in considerable obscurity (*m*). We know, however, that in the earlier times the Curia Regis was the Supreme Court of Judicature of the kingdom, and a resort for the barons and great men of the realm, who gave, as occasion required, their attendance there (*n*). We may also believe, that, in the time of Edward I., the King's Council was composed of the chancellor, the treasurer, the justices of either bench, the serjeants, some of the principal clerks of the Chancery, and such others, usually (but not exclusively) bishops, earls, and barons, as the king thought fit to name (*o*). The Supreme Council, thus composed, must, however, in order to avoid misapprehension in regard to its functions, be carefully distinguished from the Council in Parliament; the assembly called a Parliament being, at the period alluded to, formed by a union, or rather by a simultaneous assemblage, of the members of the usual Council and of such other persons as were summoned or returned to treat and advise concerning the welfare of the realm (*p*).

To the Curia Regis, which thus, during the session of Parliament, appears to have formed a component part of the legislative body, were addressed the petitions and com-

(*l*) See Cooper's Account of the Public Records, vol. 2, p. 320.

(*m*) Palgr. King's Counc. p. 19.

(*n*) Coop. Pub. Rec vol. 1, p. 410. For further details see also 2 Hall. Midd. Ages, 187.

(*o*) Palgr. King's Counc. p. 20; see also 2 Hall. Midd. Ages, 187.

(*p*) Id. ibid, 1 Reeves Hist. Eng. Law, 2nd ed., 216.

plaints of individuals seeking redress for injuries and wrongs not cognisable elsewhere, or labouring under some inability to sue at common law, or to obtain a fair trial before the inferior tribunals. Accordingly, we find, that oppressions, alleged to have been committed by the ministers and bailiffs of the Crown, nuisances which could not be abated by the common law, and trespasses which could not be so redressed, constituted fertile sources of complaint to the Council (*q*); and over such matters there can be no doubt that it gradually assumed and exercised an extensive original jurisdiction, which greatly diminished the importance and impaired the dignity of the County Courts; though these latter tribunals, derived, as above shewn, from the Anglo-Saxon times, nevertheless continued to exist throughout the land.

From this Supreme Council or Court, where the King, in theory, was always present, which attended on his person, and was, therefore, ambulatory as the sovereign changed his place of abode, we may, without much difficulty, deduce the gradual formation of a Court of Exchequer, of Common Pleas, and of King's Bench, in the manner which I shall very briefly attempt to indicate. The general clue, which may serve to guide us in this inquiry, being, that the Courts in question must be considered to have been originally in the nature of committees, delegated by the sovereign for the despatch of specific branches of the business of his Court, but which, by degrees, assumed a permanent and an altogether separate and independent existence (*r*).

(*q*) Palgr. King's Counc. 21, 22, 25; 1 Palgr. Eng. Comm. 315.

(*r*) 1 Palgr. Eng. Comm. 291. The resolution of the authority of the Aula Regis into the independent jurisdictions now exercised by the Courts of Westminster Hall, appears to have taken place very gradually. That the severance was not complete at the beginning of the fourteenth century, appears from entries cited from the rolls of the King's Bench by Mr. Serjeant Manning, in his learned work intitled Serviens ad

Original jurisdiction of Exchequer as Court of Revenue.

To commence with the Court of Exchequer. It will readily be admitted, that, on the introduction of the feudal system into this country, together with the burthens incident to it, of escheat, forfeiture, fines for alienation, for wardship, marriage, and the like, the claims of the Crown, as lord paramount, upon the subject must have become so complicated and multifarious as to require the sole and undivided attention of some peculiar department of the Royal Council; and to this necessity may properly be ascribed the origin of the Court of Exchequer, which, in its inception, was but a select committee of the supreme council, appointed to sit apart from it in the king's palace for the purpose of auditing his accounts and compelling payment of such feudal dues as were in arrear to him (*s*).

The Court of Exchequer was, then, the first offshoot from —or rather seems always to have been a subordinate department of (*t*)—the great Court of the Aula Regis; and to it all matters relating to the king's revenue were assigned for determination. So that, for example, when the Supreme Court inflicted fines on criminal offenders, the records were estreated into the Exchequer, and thence process issued for levying and getting in the fines. Here, too, the accounts of the king's revenue were made up and passed; and when, in the progress and investigation of civil causes in other Courts, penalties were imposed on the parties payable to the

Legem, p. 253. See also Coop. Pub. Rec. vol. 1, pp. 232, 411.

(*s*) The Exchequer also issued writs applicable where the rights of the subject were withheld by the officers or ministers of the Crown, as where "lands charged with the payment of rents or annuities, or liable to other claims, were vested in the Crown or its grantees, during the minority of an heir, or by way of escheat or forfeiture," and in other cases· Palgr. King's Counc. 24; see Gilb. Exch. chap. 1.

(*t*) 1 Reeves Hist. Eng Law, 2nd ed., 48.

king, his Court of Exchequer had power to call in and collect the same (*u*).

Its jurisdiction in private suits.

Although, however, the jurisdiction of the Exchequer was, in the first instance, principally, or, as some think, wholly, confined to matters connected with the revenue, or springing out of the feudal relation of lord and vassal, it is certain, that, at a very early period, this Court had acquired jurisdiction in personal actions not at all affecting the rights or revenues of the Crown (*x*). Thus, in the Statute of Rutland (10 Edw. I.), we find a clause to this effect:—"For so much as certain pleas were heretofore holden in the Exchequer, which did not concern us nor our ministers of the Exchequer, whereby as well our pleas as the causes of our people are unduly delayed and impeded, we will and ordain, That no plea shall be holden or pleaded in the Exchequer aforesaid, unless it do specially concern us and our ministers aforesaid." Notwithstanding, however, the above expression of the royal will, the practice of the Exchequer did not alter, but the Court in question continued to entertain causes of a personal nature between the subjects of the Crown, by holding, that this statute did not apply to suits between subjects who were debtors to the Crown, and then, by conniving at the plaintiff's falsely suggesting that he was such a debtor; and that, by reason of the defendant not paying what he owed to the plaintiff, the plaintiff would himself be less able to pay what he owed to the Crown (*y*). The formula to which this fiction gave rise in the process of the Court (usually known as the clause of *quo minus*) having long obtained, was finally abolished by the Uniformity of Process Act (2 Will. 4, c. 39).

(*u*) Sell. Prac. Introd. 8, 9.

(*x*) 1 Reeves Hist. Eng. Law, 2nd ed., 51. Madox Hist. Exch. 2nd ed., vol. 1, p. 209; vol. 2, p. 73.

(*y*) 1 Sell. Prac. Introd. 10, 32.

Its Equity Jurisdiction.

As regards the Equity Jurisdiction of the Court of Exchequer, a very few words will suffice. We know, that, by King Edward I., this Court was divided into two separate and distinct branches, viz. the Receipt of the Exchequer, and the Court for the Hearing of Causes (*z*). We also know, that, some time prior to the reign of Edward III., a certain kind of equitable jurisdiction was exercised by the Exchequer, and that the equitable powers thus exercised were gradually established and amplified; so that, when Blackstone wrote (*a*), and, indeed, until the recent statute, 5 Vict. c. 5 (*b*), the same jurisdiction was exercised and the same system of redress pursued on the Equity Side of the Exchequer as in the Court of Chancery, save only in respect of some few matters peculiar to each tribunal, and as to which the other could not interfere.

However, by the 1st section of the Act just mentioned (5 Vict. c. 5), the equity jurisdiction of the Court of Exchequer was abolished and transferred to the Court of Chancery. Some doubts have certainly been entertained as to the precise effect of this enactment, with reference to the equitable jurisdiction of the Court of Exchequer in revenue cases. But, upon this point, it will, I think, be quite sufficient to refer to the cases below cited (*c*).

Although the Supreme Council had, during the first century from the Norman Conquest, suffered some diminution of its business by the establishment and separate action of the Court of Exchequer in the manner already pointed out, yet it still entertained causes of moment which did not immediately concern the revenue: it had cognisance of all

(*z*) 1 Sell. Prac. Introd. 28.

(*a*) 3 Bl. Com. 426.

(*b*) See also 5 & 6 Vict. c. 86.

(*c*) *Att. Gen.* v. *Halling*, 15 M & W. 687; *Corporation of London* v. *Att. Gen.*, 1 H. L. Ca. 440.

criminal offences committed within the county where it happened to be, and it exercised jurisdiction on appeal from inferior tribunals (*d*). Further encroachments were, however, gradually made in various ways upon its power. In the first place, a practice crept in of issuing special writs or commissions of oyer and terminer, at the suit and on the complaint of individuals (*e*): for instance, where any extraordinary outrage had been committed, requiring a more speedy or more effectual remedy than could be furnished by the usual forms and process of the inferior courts. Sometimes the inquests necessitated by these complaints were ordered to be determined in the local courts, or by the justices in eyre; and sometimes to be thus taken and afterwards returned before the Council for judgment (*f*).

Special Commissions.

To restrain this practice, however, which was open to much abuse, various enactments were expressly passed; in consequence whereof, it gradually fell into desuetude (*g*).

Justices in Eyre.

Again, so early as the reign of Hen. I. and, perhaps, even in that of William the Conqueror (*h*), assizes seem to have been occasionally held by Justices Itinerant, who, by reason of the inconvenience which suitors suffered in being compelled to attend the King's Court from place to place, were commissioned to hold circuits for the administration of justice in counties and districts where the Supreme Court,

(*d*) 1 Sell. Prac. Introd. 11.

(*e*) Forms of petitions for such writs are given in Palgr. King's Counc. 28 et seq.

(*f*) Palgr. King's Counc. 25, 26.

(*g*) Palgr. King's Counc. 32, 33.

(*h*) 1 Reeves Hist. Eng. Law, 2nd ed., 54; 1 Palgr. Eng. Comm. 298. The practice of issuing commissions of assize was, however, reduced to a system by Henry II., who divided the country into circuits, and appointed itinerant justices, who seem to have had a civil as well as a criminal jurisdiction within each county: 1 Palgr. Eng. Comm. 295; 2 Hall. Midd. Ages, 188; Madox Hist. Exch. 2nd ed., vol. 1, pp. 121-2.

presided over by the Chief Justiciar, or even by the King himself, did not chance to be (*i*). From the judgment of these Itinerant Justices, in whose institution we see the germ of our present system of Assize and Nisi Prius, a right of appeal lay to the Court of Aula Regis (*k*), the frequent exercise of which right seems to have brought back to that Court the final determination of most cases of importance throughout the kingdom. Indeed, the expense and delay occasioned to suitors in having to resort to the Supreme Court, coupled perhaps with the jealousy entertained by the Crown of so powerful a subject as the Chief Justiciar (*l*), is believed ultimately to have led to the erection of the Court of Common Pleas, which seems to have become first separated, or, at all events, distinguishable from the Aula Regis in the time of Richard I. (*m*), or perhaps in that of King John; though, according to the opinion of Mr. Madox (*n*), it was not firmly established as an independent tribunal till the reign of Henry III. We know, indeed, that, by an article of Magna Charta, it was, in the reign of King John, expressly

Court of Common Pleas, when separated from the Aula Regis.

(*i*) Some of the functions of the Justices in Eyre are specified in Cooper on the Pub. Rec., vol. 1, p. 268; see also Co. Litt. 293. a.; Gilb. C. P. Introd. 28. These circuits occurred temp. Edw. I. about once in seven years.

(*k*) Whilst the feudal system remained in vigour, certain actions and suits, civil as well as criminal, fell within the cognisance of the Courts Baron, the laws and customs of which varied in different districts, and were not by any means in conformity with the law as administered in the King's Courts. Such causes were, however, not unfrequently, upon failure of justice, removed from the Court Baron into the County Court, and thence again were brought for adjudication before the justices itinerant, and from that tribunal were transferred coram rege. See Dugd. Orig. Jurid. chap. 10; Reeves Hist. Eng. Law, vol. i. pp. 317, 318.

(*l*) See Gilb. C. P. Introd. 30.

(*m*) Id. 1 Reeves Hist. Eng. Law, 2nd ed., p. 57. See Dugd. Orig. Jurid. chap. 18.

(*n*) Hist. Exch. 2nd ed., vol. 1, p. 788. See 1 Reeves Hist. Eng. Law, 2nd ed., pp. 245-6.

stipulated, that the Common Pleas should not thenceforward follow the King's Court, but should be held in some fixed locality: *Communia Placita non sequantur Curiam nostram sed in aliquo loco certo teneantur;* but the fact, that this great statute was afterwards ratified and confirmed by Henry III., shews clearly in what sense Mr. Madox's opinion must be understood, and gives, moreover, a complete sanction to it. One of the great practical grievances of that time was the necessity of following the King's Court in order to obtain justice, and hence the above article of Magna Charta.

It is, indeed, probable(*o*) that the Supreme Court had, prior to the final separation from it and establishment of the Court of Common Pleas, delegated to this latter tribunal, sitting as a subordinate committee merely, the peculiar cognisance of civil causes; and that the justices nominated for this purpose had been in the habit of leaving the High Bench and retiring into some convenient apartment for the hearing of *Communia Placita*, i. e., of 'Common Pleas,' or suits between private persons, as distinguished from 'Pleas of the Crown;' and this view of the case is confirmed by the authority of Sir Francis Palgravé(*p*), who thinks that each of our three superior Courts was originally but a committee or subordinate department of the Aula Regis.

Let this, however, be as it may, we know, that, from the reign of Henry III. down to the present time, the Court of The Common Pleas, or Common Bench, has (except during some unimportant intervals of time) remained stationary at Westminster.

It has been observed by Mr. Reeves(*q*), that the clause of

(*o*) 1 Sell. Pr. Introd. 17. (*p*) Ante, p. 27.
(*q*) Hist. Eng. Law, vol. i. p. 244.

Magna Charta, to which I have just adverted, must have had a direct and important influence upon the amount of civil business transacted in the Exchequer, as well as in the Curia Regis; for each of these great Courts attended the King wherever he happened to be, and all suits between party and party were accordingly interdicted in these Courts by the express words of the law—the Curia Regis remaining, therefore, a tribunal for the discussion of criminal matters only—the Exchequer for the cognisance of causes touching the revenue,—whilst 'Common Pleas,' i. e., suits between private persons, devolved upon the Bench (*r*). And this view of the subject is consistent with what we find in Bracton, who (writing temp. Henry III.) thus describes the various superior Courts of justice then existing: The king, he tells us, *Curiarum habet unam propriam, sicut Aulam Regiam, et Justitiarios Capitales qui proprias causas Regis terminant*, alluding, as we may fairly suppose, to the Court of Exchequer; but, then, he goes on to say that these Justices have also cognisance of the causes *aliorum omnium, per querelam vel per privilegium sive libertatem;* and these words doubtless introduce some difficulty, which will however be removed if we understand them thus:—that the Curia Regis had cognisance of civil causes between subjects, only when they were commenced *per querelam*, i. e., by a peculiar kind of writ returnable before the king himself, or where a particular individual had a grant or license from the Crown not to be impleaded anywhere save coram ipso Domino Rege; the latter part of this explanation being indeed that

(*r*) About the beginning of the reign of Edw. II., there were so many suits in Common Pleas, "that the king was necessitated to increase the number of his justices who were to sit there into six, which commonly were not above three before that time, and so to divide them, as they might sit in two places:" Dugd. Orig. Jur. p. 39.

which Bracton himself gives us. And that writer then goes on to say, that the sovereign "has also a Court and Justices of the Bench, who have cognisance of all pleas falling within their jurisdiction,"—*habet etiam Curiam et Justitiarios in banco residentes, qui cognoscunt de omnibus placitis de quibus auctoritatem habent cognoscendi*—thus, as it would seem, intending to describe the Court of Common Pleas(*s*).

It may perhaps be a matter of some interest to observe, that, although the final establishment of the Court of Common Pleas at Westminster effectually removed one grievance of considerable magnitude, which had been felt by the community at large, yet it created another. Suitors, indeed, were then no longer obliged to travel about after the King's Court in order to obtain justice; they were, however, not the less compelled, when in want of it, to come, from even the most distant parts of England, up to Westminster. Now, to remedy this inconvenience, the Stat. of Westminster 2 (13 Ed. 1, c. 10) was passed, by which it was, amongst other things, enacted, that any person impleaded "before the justices at Westminster, or in the King's Bench, or before justices assigned to take Assizes," &c., might make a *general attorney* to sue for him, "which attorney shall have full power in all pleas moved during the circuit, until the pleas be determined." The better opinion seems, indeed, to be, that the above Statute of Westminster the 2nd applied in strictness only to appearance by attorney, and not to the conduct of the suit by him after an appearance had been once made. For we learn from Glanville (who wrote in the time of Hen. II.), that even then a party might (after an appearance had been once entered by himself in person) appoint some other individual, corresponding substantially with an

Employment of Attorneys in superior Courts.

(*s*) See Reeves Hist Eng Law, vol i pp 317, 318

attorney, to represent him during the subsequent stages of the suit. It will, however, be clear, that much inconvenience was spared to suitors by the above-mentioned statute of Edward I.(*t*); and it is thought, that the habitual employment of attornies in the Courts at Westminster may properly be ascribed to it.

To return, however, to the history of our Courts of Law,—the office of Chief Justiciar, having been deprived of much of its importance by the establishment—first, of the Court of Exchequer, and, afterwards, of the Court of Common Pleas—and its dignity having been further affected by the secession of the Chancellor from the Aula Regis in the time of Henry III.,—seems, towards the close of that reign, to have fallen altogether into desuetude, until revived under a somewhat similar title, though with different functions, by Edward I.

Definitive establishment of Court of King's Bench.

To that prince (as history informs us) we are indebted, as well for the assignment of more precise limits to the respective jurisdictions of the Common Pleas and Exchequer, as for the definitive establishment of the Court of King's Bench(*u*). To him, as it would seem, we also owe the ap-

(*t*) See 1 Reeves Hist. Eng. Law, 2nd ed., 619; 2 Id. 169.

(*u*) "Anciently called Curia Domini Regis, because oftentimes the king himself sat here in person, and had his justices a latere suo residentes:" Dugd. Orig. Jurid. chap. 17, (p. 38). The functions delegated to the Judges of the King's Bench were not unfrequently exercised by the sovereign, as late as the reigns of Edw. I. and Edw. II.: Palgr. King's Counc. p. 62. When, however, King James I., at the suggestion of Bancroft, Archbishop of Canterbury, wished to take upon himself the cognisance and exclusive decision of matters touching the jurisdiction of Courts ecclesiastical, he was thus answered by Lord Coke, in the presence of all the Judges of the land,—"The king, in his own person, cannot adjudge any case, either criminal—as treason or felony—or betwixt party and party, concerning their goods, chattels, and inheritance; but this ought to be determined and adjudged in some

pointment of a chief magistrate, presiding over this latter Court, denominated Chief Justice of England, and endowed with a twofold jurisdiction: in the first place, over all Pleas of the Crown not relating to the revenue; and, secondly, over matters of a private nature involving injuries alleged to have been committed with force, or in which the defendant was charged with falsity or deceit.

Within the former of these two branches of jurisdiction, i. e., Pleas of the Crown, was comprised the cognisance of all crimes and misdemeanors, a general controlling power over all other Courts of criminal jurisdiction, and the right of inquiring into matters touching franchises and liberties, or the wrongful usurpation of official functions. Where justice was obstructed, this high functionary was empowered to compel its performance by inferior courts, corporations, and magistrates. And, where jurisdiction was exceeded or improperly assumed, he had the right of interfering to prevent or stop its undue exercise.

Under the latter head of jurisdiction, to which I have adverted, as appertaining to the Chief Justiceship, was included the cognisance of all trespasses committed vi et armis, of ejectment, replevin, rescue, pound breach, and of actions founded on deceit. All which causes of action, indeed, savoured strongly of a criminal nature, as shewn by this fact, that the defendant, if found guilty, was liable to pay a fine to the Crown, as well as damages to the party injured.

Originally, then, the Court of King's Bench had, in strictly civil cases, a very circumscribed jurisdiction; but this it shortly contrived to amplify and extend, in a manner which may here briefly be explained. In ancient times all actions

Court of justice, according to the law and custom of England:" Prohibitions del Roy, 12 Rep. 63.

Original Writ—what.

in the superior Courts were commenced by original writ, i. e. by a mandatory letter issuing out of Chancery under the Great Seal, and in the sovereign's name, directed to the sheriff of the county in which the particular injury was alleged to have been committed. This writ contained a summary statement of the cause of complaint, and required the sheriff to command the defendant to satisfy the claim made upon him; and (on his failure so to do), it further injoined the sheriff to summon the defendant to appear in one of the superior Courts to answer for his default (*x*).

A person, then, desiring redress for a grievance was, in the first instance, obliged to apply to the Chancery for an original writ adapted to the specific wrong of which he complained, in order that he might thus be enabled to commence his action in the form established and prescribed.

Writs de cursu.

Some of these original writs were intitled 'de cursu,' and seem to have been issued from the Chancery, upon the applicant swearing to the truth of the allegations contained in them, and finding pledges to prosecute his action. The tenor of these writs 'de cursu,' according to Fleta, could not be altered but by the legislature; and, it is said, that the precedents by which the clerks of the Chancery were guided in framing them, were contained in a roll or book, called the Register of the Chancery. It seems, further, that the register obtained its first sanction from constant usage, rather than from any legislative enactment, of which, at all events, no traces can be found (*y*).

The origin of these writs, although involved in much obscurity, is perhaps referable to the Normans; and their object probably was to define, with some degree of certainty, the nature of those injuries, for which the law afforded re-

(*x*) Steph. Pl. 5th ed., pp. 5, 6. (*y*) Palgr. King's Counc. pp. 15, 16.

lief, and likewise to save the trouble of inventing new modes of expression for each particular case of wrong as it might present itself (*z*).

The ordinary practice being as above mentioned, various specific forms of writs became established in the Court of Chancery, which, at length, it was thought necessary strictly to observe; so that it appears to have been not unusual in those times for a plaintiff, when no writ could be found in Chancery that suited his case, to apply to the Council for a new one (*a*). To prevent the inconvenience and possibly the denial of justice thus occasioned, it became necessary (especially when contracts increased in number, and wrongs, unknown in the ruder ages, became prevalent), to provide by a statute passed in the 13th year of Edward I. (stat. Westm. 2, c. 24), as follows: viz. that, whensoever, from thenceforth, in one case, a writ should be found in the Chancery, and in a like case (in consimili casu) falling under the same right, and requiring like remedy, no precedent of a writ could be produced, the clerks in Chancery should agree in forming a new one. And then the statute goes on to say, that "if they cannot agree, it shall be adjourned to the next Parliament (*b*), where a writ shall be framed by consent of the learned in the law, lest it happen for the future that the Court of our lord the King be deficient in doing justice to the suitors." Consequent upon the passing of this statute, a variety of new writs was prepared in and issued out of Chancery, so that a suitor who had received an injury, to which no writ previously in use was applicable, could thenceforth have one framed according to the exigency of his own particular case; and the action founded upon this writ was,

(*z*) Steph. Pl., 5th ed., App. p. 2; Palgr. King's Counc. p. 15.

(*a*) 1 Spence Chanc. Jur. 226.

(*b*) Recourse was seldom had, however, to this proceeding. Palgr King's Counc. p 17.

from the words 'in consimili casu' used in the Act, called an action of 'trespass on the case,' a form of action, be it observed, which still survives to us, though now usually denominated an action 'on the case' merely. Of this form of action, the Court of King's Bench claimed cognisance, by having the original writ made returnable before them as well as in the Court of Common Pleas, on the ground that it was for a *trespass*, for which a fine was, in strictness, payable to the Crown, although the wrongful act was not alleged to have been committed vi et armis; and thus a very large class of cases, comprising all injuries consequential upon and not directly caused by tort, was brought within the jurisdiction of the Court of King's Bench.

Not only where the cause of action savoured of *trespass* strictly speaking, but in actions also of debt, covenant, and so forth, did the Court of King's Bench, by resorting to a fiction, likewise assume jurisdiction. The modus operandi here adopted consisted in allowing a plaintiff, in the first instance, to complain of a trespass against a defendant, and afterwards, when he had thus brought him actually into Court, to waive his charge of trespass altogether, and to declare against him for a debt, breach of contract, or other matter of a purely civil nature.

The jurisdiction of the Court of King's Bench was, moreover, still further extended, in a manner which is explained to us by Sir E. Coke (*c*), who says that the Court of King's Bench had power to hold plea in all personal actions and ejectment against any one being in the custody of the marshal or officer of the Court, because a party so circumstanced might, if sued in any other Court, have pleaded the privilege of the Court of King's Bench; and this latter Court would,

(*c*) 4 Inst. 71.

consequently, in order to prevent a failure of justice, which might thus ensue, entertain the suit. Hence, where a person was once in custody of the marshal of the King's Bench at one man's suit, and was thus brought within the jurisdiction of that Court, he might be compelled before the same tribunal to answer to the complaint of any other man.

Thus did the Court of King's Bench obtain jurisdiction over all civil actions of a *personal* nature; and, although, by a statute passed long after the time of which I have latterly been speaking, viz. the 13 Car. 2, st. 2, c. 2, this acquired, or perhaps we may say usurped, jurisdiction of the Court in question, had nearly met with a decisive check, yet it was retained by an exercise of ingenuity not inferior to that by which it had been in the first instance acquired, and the precise nature of which I will attempt to shew.

The statute to which I refer enacted, that, where the defendant was to be held to bail for more than 40*l.*, by virtue of process issuing out of the Court of King's Bench or Common Pleas, the *true cause of action* should be specified in the writ or process; and, had no mode of evading this statute been devised, it is evident that civil actions of any considerable magnitude must (except where really founded in trespass) have been altogether withdrawn from the cognisance of those Courts. However, out of this dilemma, the justices of the King's Bench extricated themselves in the following manner. A plaintiff, whose cause of action justified him in holding the defendant to bail for more than 40*l.*, was permitted, in his process, to command the sheriff to arrest the defendant, in order that he might answer the plaintiff in a plea of trespass, *and also* for a *debt* (or as the case might be). So that, by the introduction in the process of this *ac etiam* clause, (as it was called,) jurisdiction having been first given

to the Court by the fictitious allegation of a trespass as the ground of complaint, the words of the statute were then complied with, by setting forth the true cause of action in the writ. This peculiar form of procedure was finally abolished by the Uniformity of Process Act (2 Will. 4, c. 39).

Actual Jurisdiction of superior Courts.

To sum up, then, the extent and nature of the jurisdiction exercised by our principal Courts of Common Law at this day, we must first remember, that, in all personal actions and in ejectment, they have co-equal and concurrent jurisdiction; and that an appeal from the County Court lies to any one of our three superior Courts indifferently. We must, then, remark, that the Court of Queen's Bench has peculiarly delegated to it the surveillance over all inferior tribunals, which, as Sir W. Blackstone (*d*) tells us, it keeps within the bounds of their authority, either removing their proceedings by certiorari for its own special determination, or by writ of prohibition, staying their progress in the Court below (*e*). It superintends, by quo warranto and mandamus, all civil corporations in the kingdom. It commands magistrates and others to do what their duty requires in every case where there is no other specific remedy (*f*). It protects the liberty of the subject by speedy and summary interposition, and takes cognisance both of civil and criminal matters, of the one on the Plea, and of the other on the Crown side of the Court.

The Court of Common Pleas has a special cognisance of real actions, which are now, however, of comparatively rare occurrence. It is also the Court of Appeal from the decisions of the revising barristers, under the statute 6 & 7 Vict. c. 18;

(*d*) 3 Com. 41, 42.

(*e*) A writ of certiorari or prohibition lies to the County Court from any one of the three Courts at Westminster.

(*f*) Post, Chap. 5.

and the certificates of acknowledgments by married women, under the Act for the Abolition of Fines and Recoveries (3 & 4 Will. 4, c. 74), with the affidavits verifying them, are filed of record in this Court, in pursuance of the 85th section of that statute.

The Exchequer, besides the remnant (if any) of its equity jurisdiction (*g*), still retains peculiar and exclusive cognisance of matters of revenue, ex. gr. of complaints arising out of alleged infringements of the laws regulating the Customs and Excise, or where on any issue raised between private parties the title of the Crown is brought in question, or the interests of the revenue are threatened. If, therefore, an action touching any of the matters just specified should be brought in the Court of Queen's Bench or Common Pleas, it will, on motion, be removed into the Exchequer (*h*): the basis of the jurisdiction exercised by that Court in so removing it, being, as remarked by a learned Judge in *Att.-Gen.* v. *Kingston* (*i*) (which was an action against a revenue officer for the value of goods seized by him in execution of his duty), that it is a contempt of the Exchequer to proceed elsewhere in respect of any matter within its own peculiar jurisdiction.

The above is a summary statement, merely, of the leading branches of jurisdiction appertaining to our three superior Courts of Common Law. But, should minute information be desired respecting the precise matters which fall within the scope of their general co-ordinate jurisdiction, I may observe, that such knowledge can only be obtained—and familiarity with their ordinary course of proceeding be acquired—by actual attendance at the Courts during their

(*g*) Ante, p. 30.

(*h*) *Adams* v. *Freemantle*, 2 Exch. 453; *Att.-Gen.* v. *Hallett*, 15 M. & W. 97; *Siddon* v. *East*, 1 C. & J. 12.

(*i*) 8 M. & W. 163.

Sittings in Banc at Westminster, coupled with a careful study and examination of the various departments of our law there administered.

General remarks

Some few remarks, however, of a general kind, bearing directly upon the subject now before us, yet remain to be offered, wherewith this subdivision of the present Chapter may, perhaps, appropriately conclude.

Agreement to oust jurisdiction of the Courts.

In the first place, it should be borne in mind, that, on grounds of public policy, and, as it would seem, in accordance with an elementary principle already noticed (*j*), any agreement, the object of which is to prevent the suffering party from coming for redress into a Court of law, or, in other words, which 'ousts the Courts of their jurisdiction,' is void. But this rule must be understood in a somewhat qualified sense: for instance, it is not unlawful for parties to agree to impose a condition precedent with respect to the mode of settling the amount of damage, in case any should be sustained, or the time for paying it, or any matter of a similar kind which does not go to the root of the action (*k*).

urisdictio n by consent.

2ndly. As on the one hand parties cannot oust the jurisdiction of the Courts by their own agreement or convention, so, on the other hand, they cannot, by consent, give the Courts jurisdiction over matters which do not properly fall within it (*l*); for all Judges must derive their authority from the Crown by some commission warranted by law (*m*), and they cannot act officially dehors the scope of the powers thus confided to them.

(*j*) Ante, p. 9.

(*k*) *Scott* v. *Avery*, 8 Exch. 487, 500; *Avery* v. *Scott*, Id. ibid.

(*l*) See *Groves* v. *Janssens*, 23 L. J., Exch., 91; *Avards* v. *Rhodes*, 8 Exch. 312. Per *Maule*, J., *Gibbon* v. *Gibbon*, 22 L. J., C. P., 133-4.

(*m*) Bac. Abr. Courts (B).

Territorial limits of jurisdiction.

3rdly. The jurisdiction of our superior Courts of law in civil cases, strictly speaking, extends over the counties of England and Wales, and the town of Berwick-upon-Tweed. In one sense, indeed, the Courts in question have a far more extensive jurisdiction; for they have cognisance of any cause of action of a transitory nature, as for a breach of contract entered into, or a trespass to the person committed in a foreign country (*n*); but, in adjudicating upon such cases, our Courts will have regard to the laws of the country in which the cause of action arose, albeit their mode of procedure will be in conformity with our own law and practice. In other words, all that relates *ad litis decisionem* is, in such cases, adopted from the foreign country; and so much of the law as affects the remedy only, or that relates *ad litis ordinationem*, is taken from the lex fori of that country in which the action is brought (*o*). For instance, if an action be commenced here on a promissory note, made in France, by the plaintiff as indorsee against the defendant as maker of the note, and at the trial it be shewn that the indorsement, although good according to our own law, is invalid according to the law of France, the plaintiff will fail to recover upon the note. If, however, we suppose that the instrument in question is perfectly unexceptionable, regard being had to the law of the country where it was made, and further, that if *there* put in suit, no valid defence would have been open to the defendant, this latter party may *here* rely

(*n*) See *Mostyn* v. *Fabrigas*, 1 Smith L. C. 340, 356-8, with the note thereto; *Parker* v. *Dormer*, 1 Show. 187; *Doulson* v. *Matthews*, 4 T. R. 503; Story Confl. L. s. 317; Judgment, *Wilde* v. *Sheridan*, 22 L. J., Q. B., 260.

(*o*) Judgment, *Huber* v. *Steiner*, 2 B. & C. 210; *De la Vega* v. *Vianna*, 1 B. & Ad. 284; *General Steam Nav. Co.* v. *Guillou*, 11 M. & W. 877, 895; Judgment, *Wilde* v. *Sheridan*, supra; *Ralli* v. *Dennistoun*, 6 Exch. 483.

upon the Statute of Limitations as a good answer to the action, or may take advantage of any non-compliance by the plaintiff with the established practice of our Courts, or with the mode of procedure observed by them (*p*).

Upon this subject, which depends in fact on the principles of international law and comity, I may refer to the late case of *Leroux* v. *Brown* (*q*), where it was held, that an action cannot be maintained in our Courts upon a verbal contract made in France, not to be performed within a year, and therefore within the 4th section of our Statute of Frauds (29 Charles 2, c. 3), the contract in question being valid according to the French law. Now, this case was decided upon the specific ground, that the section of the Act alluded to, in declaring that an action shall not be brought in this country upon a contract such as that above mentioned, operates not upon the validity of the contract, but upon the mode of procedure to be adopted with reference to it; which latter is to be regulated in accordance with our own rules and practice.

Precisely on the same ground a document, which, by the law of the foreign country in which it was made, would there be inadmissible in evidence for want of a stamp, may, nevertheless, be received in our Courts. Though, if for want of a stamp the contract would be altogether void in the foreign country, it clearly could not here be enforced (*r*).

Service of process abroad.

4thly. Not only may causes of action which have originated abroad be in many cases brought within the cognisance of the Courts at Westminster, but persons resident abroad, whether foreigners or subjects of the Crown, may,

(*p*) *Trimbey* v. *Vignier*, 1 Bing. N. C. 151; *British Linen Co.* v. *Drummond*, 10 B. & C. 903.

(*q*) 12 C. B. 801.

(*r*) *Bristow* v. *Sequeville*, 5 Exch. 275. See further as to the subject above treated of, Wheat. Intern. Law, 146, 149.

under the provisions of the Common Law Procedure Act, and subject to certain conditions which I shall hereafter specify, be effectually served with process issuing out of our Courts; and thus an action may now be commenced in this country and prosecuted against absentees with a view ultimately to issuing execution against their property and effects here situate (*s*). It may, however, be as well to add, that civil process, by way of execution against the person (*t*) of a defendant, clearly cannot be enforced beyond the limits of this kingdom already specified; because, in such case, the maxim still holds—*extra territorium jus dicenti impune non paretur.*

2. *Mode of Procedure in Banc and at Judges' Chambers.*

Constitution of superior Courts.

The Judges.

Although, in the earlier stages of their existence, the number of Judges sitting in the Courts at Westminster was subject to considerable fluctuation (*u*), there is no doubt, that, for a long period prior to the stat. 1 Will. 4, c. 70, each of the three Courts was composed of a Chief and three Puisne Judges; and, by the 1st section of that Act, the Crown was empowered to appoint an additional Puisne Judge to each Court; and this power having been acted upon, each of the three Courts has, since the passing of the Act in question, been presided over by a Chief and four Puisne Judges, who, by virtue of the 12 & 13 Will. 3, c. 2, hold office *quamdiu se bene gesserint,* and are only removable on the address of both Houses of Parliament; their tenure of

(*s*) Post, Chap. 4.

(*t*) A criminal offender, who has gone abroad, may, however, in some cases be brought within the jurisdiction of our Courts by virtue of international treaties.

(*u*) Ante, p. 34, n. (*r*); 1 Spence Chanc. Jur. 113.

office having been, moreover, since 1 Geo. 3, c. 23, unaffected by the demise of the Crown (*x*).

The Masters.

Besides the Judges, there are attached to each of the three Courts at Westminster five Masters, upon whom devolve many important and responsible duties, such as the taxing of attornies' bills and of costs generally, the examination of affidavits, and the making minutes of judgments, rules, and orders of the Court. The Masters have, moreover, the custody of the records, and are often appealed to as being, in some sort, the depositories of the rules of practice of the Courts. They have likewise certain peculiar duties to discharge, connected with the branches of exclusive jurisdiction of each Court (*y*).

Of what matters or classes of cases our Courts take cognisance.

The matters which are brought within the cognisance of our superior Courts of law may properly be divided or parcelled out into three great branches, viz. 1st, purely Civil; 2ndly, quasi Criminal; and 3rdly, Criminal—Proceedings.

To the head of purely civil matters or proceedings might be referred the entire theory of, and practice connected with, private rights, wrongs, and remedies; the science of pleading in civil actions; the code of practice to be observed therein; everything, in short, connected with, or ancillary or incidental to, the conduct of a suit or an action at law, whether before a superior or an inferior tribunal.

Within the second of the two heads just specified might, according to the usual arrangement, be included matters or proceedings connected with indictments for nuisances, the non-repair of roads, &c., criminal informations for libels, the ordinary applications for writs of quo warranto, mandamus,

(*x*) As to the civil liability of the Judges of our superior Courts, see post, Chap. 3.

(*y*) As to the duties of the Masters in each Court, see further Dax, Pr. 11—22.

or prohibition, questions raised for judicial decision in connection with the administration of the Poor Law (*a*), and many other kindred or analogous matters which daily demand the attention of our Courts in banc, but which it would be useless to enumerate.

As falling within the class of purely criminal proceedings might be specified an application for a habeas corpus to bring up the body of a prisoner, a motion to quash an inquisition, to remove an indictment for a misdemeanor into the Queen's Bench from the Sessions or from the Central Criminal Court; everything, in short, connected with or originating out of the general criminal law of the land (*b*).

Mode of procedure;

The mode of procedure observed in our superior Courts, so far as it is connected with matters of a civil nature, may most conveniently be treated in the following order:—1st, the Mode of Procedure in Banc; 2ndly, that at Judges' Chambers; and 3rdly, that at Nisi Prius—whether on circuit or at the sittings in London or at Westminster.

—in banc.

1. In the first place, then, I will attempt to convey some idea of the mode in which our superior Courts, sitting in banc, are set judicially in motion; and of the manner in which their jurisdiction, when solicited, is exercised. Now, here it becomes at once necessary to distinguish between their *formal* and their *summary* jurisdiction. The first-mentioned branch of jurisdiction "consists in the sanction given by the authority of the Court to those formal *de cursu* proceedings which constitute the ordinary and regular steps in a suit" (*c*), and which will be separately considered in the Fourth Chapter of this Book.

Jurisdiction, formal or summary.

(*a*) Warr. Law Studies, 2nd ed. 287.

(*b*) Id. ibid.

(*c*) Smith El. View, 2nd. ed., p. 14.

Summary jurisdiction—what;

The summary jurisdiction exercised by the superior Courts "exists," as Mr. Smith tells us (*d*), "either at common law or under the provisions of certain Acts of Parliament. So far as it exists at common law, it is calculated to effect one of four purposes:—1. To prevent the regulations of the Courts from being infringed; 2. To prevent their authority from being abused; 3. To prevent it from producing hardship; 4. To enforce good conduct on the part of those who are peculiarly within their jurisdiction." Cases referable respectively to each head or subdivision of the classification here adopted will present themselves to the reader during his progress through the present volume.

—how exercised;

The summary jurisdiction of the Court is exercised upon *motion*, made to it, by *rule* or *order* of the Court founded thereupon; a *motion* being, indeed, merely an application to the Court, praying it to grant a *rule*, either conditional or absolute, in respect of some particular matter within its cognisance and jurisdiction. Such matter may or may not be connected with the progress of a cause; it may be, as already intimated (*e*), of a civil, of a quasi-criminal, or of a criminal nature.

—by motion;

Motions are usually made orally and in open Court; and an application of this kind must (save in some peculiar cases, ex. gr. where an order is made on the mere suggestion of the Attorney-General,) be accompanied by an affidavit (*f*) or

(*d*) Smith El. View, 2nd ed., pp. 16—19, where each of these heads of jurisdiction is concisely explained and illustrated.

(*e*) Ante, p. 48.

(*f*) The 146th Rule of Practice expressly declares, that "No rule which the Court has granted upon the foundation of any affidavit shall be of any force, unless such affidavit shall have been actually made before such rule was moved for, and produced in Court at the time of making the motion." The requisites of affidavits in general are specified in the Rules of Practice, commencing at reg. 138. See *Adams* v. *Fremantle*, 2 Exch. 453.

written statement upon oath, exhibiting, in a concise and orderly manner, the facts out of which the application springs: an affidavit being required in order that authentic information may thus be given to the Court as to the specific grounds upon which its interference is sought; and it is above all things necessary, that the contents of an affidavit should, when the nature of the facts deposed to admits of it (*g*), be explicit and positive; so that, if false, an indictment for perjury might lie against the deponent.

If the Court is satisfied with the contents of the affidavit, and thinks that a primâ facie case has been made out for its interference, a rule *nisi* or a rule *to shew cause* will be granted; the former being a rule conditioned to become absolute, or which makes itself absolute, *unless* cause be shewn to the contrary; and the latter, a rule calling on the opposite party to shew to the Court, on a particular day named in the rule, good cause why the thing specified therein should not be done. There are cases also in which a rule *absolute* will be granted in the first instance (*h*). —and rule.

The rule to shew cause is prepared in a proper form by the officer of the Court, and must, under the 149th of the Rules of Practice lately issued (*Hilary Term*, 1853), bear date of the day of the week, month, and year, on which it is drawn up; it must also be served on the opposite party. And with respect to the service of rules of Court, I may observe, that provisions regulating the time, place, and mode of such service, will be found in the 162nd and five following of the Rules of Practice to which I have just adverted. Rule to shew cause.

(*g*) See *Lumley* v. *Gye*, 22 L. J., Exch., 9.
(*h*) See, for instance, Reg. H. T. 16 Vict. 168.

If, on the day appointed for that purpose and specified in the rule (*i*), no cause is shewn on behalf of the party upon whom it has been served and whom it seeks to affect, the rule will, upon a proper affidavit of service, be made absolute. If, however, cause is shewn against it, that is, if counsel appear and argue in opposition to the rule, the Court will, in the exercise of their discretion, either *discharge* the rule, or in part or altogether *make it absolute.* In some cases, indeed, they will refer the matter thus brought before them to one of the Masters of the Court, to inquire into and report upon; or occasionally they may, with a view to insuring complete justice between the parties, *direct an issue,* moulded in some particular form, for trial by a jury. But if the rule be made absolute, and be not re-opened by permission of the Court, (which is, however, seldom granted) non-compliance (*k*) with its requirements will be a contempt of Court, and punishable by attachment: the attachment being a judicial writ directed to the sheriff, and commanding him to arrest the individual who has been guilty of the contempt (*l*).

It may be observed, however, as a general rule, that an attachment for contempt will be granted only where the party against whom it is applied for has been called upon to do, and has wilfully omitted to do, some specific act.

(*i*) A rule will sometimes be *enlarged*, i. e. further time for shewing cause will be granted, either by consent of the parties or on special grounds submitted to the Court. See Reg. H. T. 16 Vict. 151, 152. Cause, moreover, is sometimes, with a view to preventing delay and expense, shewn in the first instance, i. e. on the rule nisi being moved.

(*k*) By stat. 1 & 2 Vict. c. 110, s. 18, a rule of Court, whereby "any sum of money, or any costs, charges, or expenses shall be payable to any person," has the effect of a judgment, and is enforceable by execution.

(*l*) See further as to the practice connected with rules and motions, Bagl. Pr. 279; 2 Chitt. Arch. Pr. 8th ed. 1410.

Such motions occur, perhaps, most frequently in cases of awards. There the direction contained in the award becomes, upon the award being made a rule of Court, in effect, the direction of the Court. But, nevertheless, the Court always takes especial care to see that the award is express and distinct in directing the particular matter to be done before it will attach the party for disobeying it. And the same strictness is likewise usually observed by the Court in enforcing performance of its own ordinary rules (*m*).

Although much time is occupied during the sitting of the Court in banc, in hearing motions for and arguments upon rules in respect of matters summarily brought before it, much time is also taken up with the argument of demurrers, special cases, special verdicts, and the like. Nor is business of this kind necessarily confined to the sittings of the Courts in Term time (*n*); for our common law Courts also, by virtue of the 1 & 2 Vict. c. 32, s. 1, hold sittings at their discretion in the vacation, at times of which due notice is given (*o*). And by the statute just cited, it is enacted, that all judgments then pronounced, and all rules and orders then made, shall have the same effect as if they had been pronounced or made in Term time.

Practice Court.

As ancillary to the sittings in banc of the Court of Queen's Bench, I must mention the Bail Court, where much business, usually of a less difficult kind than that discussed in the full Court, is despatched before a single Judge (*p*), who derives his authority, when sitting there,

(*m*) Per *Wilde*, C. J., *Doe* d. *Earl of Cardigan* v. *Bywater*, 7 C. B. 794.

(*n*) The commencement and duration of each Term is regulated by statutes, viz. 11 Geo. 4 & 1 Will. 4, c. 70, s. 6, and 1 Will. 4, c. 3, s. 3. See also Reg. H. T. 16 Vict. 173, 174, 175.

(*o*) See *Field* v. *Mackenzie*, 6 C. B. 384.

(*p*) See *Todd* v. *Jeffery*, 7 Ad. & E. 519.

from the 1 Will. 4, c. 70, s. 1, which enacts, that it shall and may be lawful for any one of the Judges of either of the three Courts at Westminster, when occasion shall so require, while the other Judges of the same Court are sitting in banc, to sit apart from them, for the purpose, inter alia, of hearing and deciding upon matters on motion, and making rules and orders in matters depending in the Court to which the presiding Judge may belong. By virtue of this Act, also, a single Judge of the Exchequer usually sits apart from the full Court on the last day or two of every Term, for the purpose of hearing and disposing of such motions as may be brought before him.

Business at Judges' Chambers.

2. Besides the jurisdiction thus exercised by the superior Courts at Westminster, a vast number of matters of much practical importance and urgency are disposed of at Judges' Chambers, where a Judge of each Court attends daily in Term time, and for the most part in Vacation also, for the hearing of such applications as may be made to him. During the long Vacation, indeed, one Judge usually stops in town to transact such routine business as may require his attention.

The origin of the jurisdiction of a Judge at Chambers is involved in much obscurity; but, as remarked by Chief Justice *Wilmot* (*p*), whenever it began, it stands upon too firm a basis to be now shaken,—that basis being constant immemorial usage, 'sanctified and recognised' by the Courts of Westminster Hall, and, in many instances, by the legislature, so that it has, at this day, become as much a part of the law of the land as any other course of practice, which custom or usage has established.

Notwithstanding the difficulty of arriving at any precise

(*q*) Opinions, p. 264.

and definite conclusion as to the time when, and mode in which, the jurisdiction of a Judge at Chambers originated, there can be no doubt that it was introduced with a view to the ease and convenience of suitors, and in order that they might be accommodated, in a great variety of cases, at comparatively little expense and trouble. It would be easy, also, to shew, that the jurisdiction of a Judge at Chambers has been expressly recognised and sanctioned by the legislature: for instance,—I might refer to the 1 Will. 4, c. 70, the 4th section of which statute enacts, that every Judge of the superior Courts of law, to whatever Court he may belong, shall be authorised to transact such business at Chambers and elsewhere, depending in any of the said Courts, as relates to matters over which they have a common jurisdiction, and as may, according to the course and practice of the Court, be transacted by a single Judge; and the jurisdiction of a Judge at Chambers is further extended by the 1 & 2 Vict. c. 45, s. 1, which provides, that every Judge of any one of the three superior Courts shall have equal jurisdiction, power, and authority to transact, out of Court, such business as may, according to the course and practice of the Court, be so transacted by a single Judge, relating to any suit or proceeding in either of the said Courts, or on the common law or revenue side of the Court of Exchequer, or to any matter usually transacted out of Court, although the said Courts have no common jurisdiction therein, in like manner as if the Judge transacting such business had been a Judge of the Court to which the same by law belongs: the effect of this enactment being to give to the Judges of the respective Courts a general and concurrent jurisdiction in the transaction of business at Chambers, in very comprehensive terms (*r*).

(*r*) See per *Maule*, J., *Bennett* v. *Dean*, 5 Scott N. R 136.

Whilst, upon this part of the subject, it may be proper to observe, that sometimes a particular act of Parliament requires that an application founded upon it should be made to the full Court; and, in every such case, the jurisdiction of a Judge at Chambers is, of course, wholly excluded; sometimes, moreover, a distinction is specially made between the authority and powers to be exercised in banc, and those confided to a Judge at Chambers; and here again, provided the intention of the legislature be clearly expressed, no difficulty can occur. But there are also cases in which a doubt may reasonably be felt as to the meaning of the words used by the legislature, and where, consequently, a Judge at Chambers might decline to exercise jurisdiction. If, however, some special power or authority is given to "the Courts" by statute, the presumption will be, that it was intended to be exercised as the Courts usually exercise their jurisdiction; and it may, accordingly, fall within the province of a Judge at Chambers to put in force the provisions of the Act in question(*s*).

Mode of Procedure at Chambers.

The ordinary mode of procedure at Chambers is, as might be expected, somewhat different from that observed in the full Court; for, as in the latter case, it is by rule and order of the Court, so, in the former, it is by *summons*, supported at the hearing by affidavits and *order* of the Judge founded thereupon.

To explain the mode of procedure alluded to somewhat more minutely,—the party requiring the intervention of the Judge in the first place takes out a summons, which is issued by the Judge's clerk, and serves a copy of this summons upon the opposite party. The summons calls upon such party, or upon the individual whose interests may be

(*s*) See per *Parke*, B., *Smeeton* v. *Collier*, 5 D. & L. 189, 190.

affected by the application, to *shew cause* at Chambers, on a particular day, and at an hour specified therein, why the matter or thing, performance of which is sought to be enforced, should not be done.

If the party on whom the summons is served does not appear thereto, the 153rd Rule of Practice directs, that the party taking out such summons shall be entitled to an order on the return of it (*t*).

Should, however, the opposite party duly appear to the summons, the matter involved in the application will be discussed before the Judge, who either will determine it himself, (in which case he usually indorses a minute of his decision on the summons,) or, in cases of importance, may refer the applicant to the full Court. When the order is made by the Judge, it ought to be drawn up and served forthwith, otherwise the opposite party may treat it as abandoned.

If the order be served, but not obeyed, it should then be made a rule of Court (*u*); and may afterwards be enforced, if necessary, by attachment (*x*).

Should the party to whose interests the Judge's order is adverse, wish to dispute its correctness or validity, he may in general do so by an application to the *full Court*, which is in the nature of an appeal from the decision of the Judge at Chambers.

There is, however, a marked distinction to be noticed between cases where an objection is taken to the particular mode of compliance with the Judge's order, and those where the manner in which his discretionary power has been exercised and the propriety of his decision are called in ques-

(*t*) See also Reg. Hil. T. 16 Vict. 154.

(*u*) A Judge's order obtained in Vacation cannot, however, be made a rule of Court before the next Term Reg. Hil. T. 16 Vict. 158.

(*x*) See *Ex parte Willand*, 11 C. B. 544; Per *Tindal*, C. J., 9 Bing. 105; *Dent* v. *Basham*, 9 Exch. 469.

tion. In the former class of cases, the Judge who made the order will (on being applied to for that purpose) himself see that it is properly carried out, whilst, in the latter, the party dissatisfied with the decision at Chambers must (provided he is not debarred from doing so by the express words of some particular statute,) apply to the Court in banc (*y*). Even in case of an erroneous decision by the Judge, it is worthy of notice, that although the Court in banc will control and revise such decision, where it was given under an authority delegated by them, yet, they will not in general do so, where the Judge was acting under distinct and independent powers, conferred upon him by the statute law; and, in this latter case, the words of the particular Act, and the intention of the legislature, must necessarily determine as to the finality of the decision of the Judge. So, where a party has the option of applying, either to the Court or at Chambers, in a matter which is expressly left to the discretion of the tribunal to which application may be made, the party electing to apply at Chambers will not, perhaps, be permitted afterwards to appeal to the full Court (*z*). Though the Court will sometimes entertain a matter on an original application, which they would not have listened to, if brought before them by way of appeal from a Judge at Chambers (*a*).

It is, moreover, a general rule, in support of which many authorities might be cited (*b*), that an appeal from the decision of a Judge at Chambers to the Court at Westminster must be made speedily, or, at all events, within a reasonable time, regard being had to special circumstances, if

(*y*) See per *Alderson*, B., *Rennie* v. *Beresford*, 3 D. & L. 468; *Griffith* v. *Selby*, 9 Exch. 393.

(*z*) See the remarks per Cur. in *Palmer* v. *Richards*, 6 Exch. 335, *Cann* v. *Facey*, 4 Ad. & E. 68.

(*a*) See *Clark* v. *Smith*, 3 C. B. 982; *Wearing* v. *Smith*, 16 L. J., Q. B., 1.

(*b*) See 2 Chitt. Arch. Pr., 8th ed., 1443.

any, appearing in the case (*c*). "It is," says Lord *Campbell*, C. J. (*d*), "a very wholesome rule, that all applications to review the decision of a Judge at Chambers should be made in the *ensuing Term*," i. e. the Term next ensuing after the hearing of the summons.

Business at Nisi Prius.

The 3rd head of inquiry suggested at p. 49, was, as to the mode of procedure before a Judge sitting at Nisi Prius; inasmuch, however, as this will have to be considered at some length, when I come to treat of the successive steps in an action at law in the 4th Chapter of this Book, in order to avoid repetition, reference thither should be made for information upon the subject just specified.

SECT. II. *Jurisdiction of the County Court.*

General jurisdiction.

The "general jurisdiction" of the County Court (*e*), as at present constituted, "in actions personal," is defined by the 58th section of the original County Courts Act, (9 & 10 Vict. c. 95,) as extended and amended by the 1st section of the 13 & 14 Vict. c. 61 (the Extension Act). The effect of these sections being, that "all pleas of personal actions," where the "debt, damage, or demand" does not exceed the sum of 50*l.*, "whether on balance of account or otherwise, may be holden in the County Court," "provided always, that the Court shall not have cognisance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any

(*c*) *Griffin* v. *Bradley*, 6 C. B. 722; *Orchard* v. *Moxsey*, 2 E. & B. 206; *Orgill* v. *Bell*, 5 D. & L. 217; *Asplin* v. *Blackman*, 7 Exch. 386; *Reid* v. *Gardner*, 8 Exch. 651; *Morris* v. *Bosworth*, 2 E. & B. 213; *Crake* v. *Powell*, Id. 210.

(*d*) *Meredith* v. *Gittens*, 21 L. J., Q. B., 273.

(*e*) The County Court here spoken of, which is entirely a creature of the statute law, must not, of course, be confounded with the sheriff's court, which represents the old county court of the Anglo Saxon and Norman times, ante, p. 23.

toll, fair, market, or franchise shall be in question, or in which the validity of any devise, bequest, or limitation under any will or settlement may be disputed, or for any malicious prosecution, or for any libel or slander, or for criminal conversation, or for seduction or breach of promise of marriage."

It will obviously be convenient, in treating of the jurisdiction of the County Court, to adopt the plan indicated in the statutory provisions above set out, and to consider, in the 1st place, the class of cases which fall within, and, 2ndly, those which are expressly excluded from the jurisdiction of the Court in question. To prevent the possibility of misapprehension, however, it may be right to observe in limine, that (save in some peculiar cases to be presently mentioned,) the inferior Court, of which I am now speaking, possesses no jurisdiction altogether exclusive of that belonging to the higher tribunal, unless it be in this sense, that a plaintiff needlessly electing to sue in the more costly, where he might have had recourse to the cheaper tribunal, will not unfrequently be punished by the loss of costs.

1. The County Court has, then, a general jurisdiction to entertain pleas of personal actions, where the "debt, damage, or demand," does not exceed the sum of 50*l.*, whether "on balance of account or otherwise." This Court may, therefore, take cognisance of an action upon a bill of exchange or promissory note (*f*), or for the recovery of goods in specie (*g*). But what, it may be asked, is the precise meaning of the expression "balance of account," which occurs in the 58th section of the County Courts Act? The answer is, that these words are intended to apply to accounts which have been adjusted, settled, ascertained, or balanced by the parties, or

(*f*) *Waters* v. *Handley*, 6 D. & L. 88; *Nind* v. *Rhodes*, 5 D. & L. 621. See also *Lowley* v. *Rossi*, 12 Q. B. 952.

(*g*) *Taylor* v. *Addyman*, 22 L.J., C. P., 94.

to any debt which has been reduced within the prescribed limit of 50*l.*, by *payment* or *something equivalent thereto.* Suppose, for instance, a claim to be preferred in the County Court for a sum below 50*l.*, and suppose it appears that the debt originally due from the defendant exceeded that amount, but has been reduced below it by payment before action brought, the defendant will not, under such circumstances, be entitled to say, that the case is without the jurisdiction of the County Court (*h*). So, if anything other than money be received in reduction of a debt by agreement of the parties, that will be equivalent to payment, so as to bring the case within the jurisdiction of the County Court (*i*), the question, whether it was so received or not, being determinable from the evidence pro and con which may be adduced (*k*).

In connection with this part of the subject, it is, however, well worthy of notice, that a claim *exceeding* 50*l.* cannot, by merely *giving credit for a set-off* (*l*), be reduced so as to bring it properly within the cognizance and jurisdiction of the County Court, for a set-off is properly matter for a cross action, and cannot, without the defendant's consent, be deemed 'equivalent to payment.' If, indeed, it could be so considered, this consequence would manifestly follow, that a plaintiff might, by crediting the defendant with a set-off, evade the intention apparent in the County Court Acts.

A fortiori, then, a case will not be cognisable by the County Court in which a claim exceeding 50*l.* is reduced by a *plea* of set-off within that amount; for if it were so, the Court

(*h*) See per *Maule*, J., *Woodhams* v. *Newman*, 7 C. B. 654; per *Parke*, B., *Turner* v. *Berry*, 5 Exch. 858.

(*i*) See *Hooper* v. *Stephens*, 4 Ad. & E. 71; *Hills* v. *Mesnard*, 10 Q. B. 266.

(*k*) See *Joseph* v. *Henry*, 1 L. M. & P. 388; *Avards* v. *Rhodes*, 8 Exch. 312.

(*l*) The distinction between "payment" and "set-off" will be hereafter noticed, post, Bk. II.

might be called upon to investigate two several claims, each of them far exceeding the limits of its statutory jurisdiction (*m*).

The recent case of *Avards* v. *Rhodes* (*n*) shews very clearly, that, although a debt reduced by payment below 50*l.* would be within the scope of the inferior jurisdiction, yet it would not be so if reduced below that amount by a set-off, unless such set-off had been actually allowed as an item in account by agreement of the parties; there the Court remark as follows:—"It cannot be that the judge [of the County Court] may investigate claims to any amount provided his judgment does not exceed the limits of 50*l.* But no doubt, where the plaintiff claims a balance of 50*l.* only, it may happen that the judge may have to investigate demands to a much larger amount; and if there be a part payment or set-off agreed to, it may be required that the plaintiff is to prove a sum which will overtop that payment or set-off, and which may much exceed 50*l.*; but that is made necessary by the introduction into the Acts of the term 'balance of account,' that is, over and above all payments; but that is a very different case to a claim of a greater sum, with an offer of a set-off of one reducing the amount to or below 50*l.*"

But, although, according to the above case, a plaintiff claiming more than 50*l.* will not be permitted at the hearing to abandon the excess, so as to bring himself within the jurisdiction, the case would seem to be different where his original claim is for a sum not exceeding 50*l.*, but proof is

(*m*) *Woodhams* v. *Newman*, 7 C. B. 654; *Beswick* v. *Capper*, Id. 669; *Kimpton* v. *Willey*, 1 L. M. & P. 280.

(*n*) 8 Exch. 312. A tender would likewise be inoperative to bring a debt exceeding 50*l.* within the jurisdiction of the County Court, see *Crosse* v. *Seaman*, 10 C. B. 884.

given that this claim is really a portion only of a debt exceeding that amount (*o*).

Splitting demands

The next point to notice in connexion with this part of the subject is, that, by the 63rd section of the 9 & 10 Vict. c. 95 (as extended by the 13 & 14 Vict. c. 61, s. 1), "it shall not be lawful for any plaintiff to *divide any cause of action* for the purpose of bringing two or more suits" in the County Court. But a plaintiff claiming "a debt, damage, or demand" for more than 50*l.*, may, if so minded, (by the express provisions of the 63rd section just mentioned,) "*abandon the excess,*" and recover to an amount not exceeding the 50*l.*

The leading case decided upon the above section (which, in common parlance, is said to forbid the 'splitting of a demand,') is that of *Grimbly* v. *Aykroyd* (*p*), where the facts were as follow: the defendant was a railway contractor, and the plaintiff was a shopkeeper, who supplied goods to the workmen employed on the line, upon the authority of tickets, specifying particular amounts as due to them, signed by a sub-contractor employed by the defendant, and given to the workmen in part payment of their wages. Upwards of three thousand of these tickets had been presented to the plaintiff, and goods supplied upon them to the men. Owing to the mode in which this case was presented to the Court at Westminster, viz. on motion for a prohibition, no question arose as to whether or not the defendant had *authorised* the supply of goods by the plaintiff. His authority was taken as proved; and we may also assume that the goods had been supplied in pursuance of *one continuing autho-*

(*o*) *Isaac* v. *Wyld*, 7 Exch. 163, cited 8 Id. 318. In order to preclude the possibility of such questions arising, the 'abandonment' ought to appear upon the summons: see per *Manning*, Serjt., 1 Exch. 487; *Vines* v. *Arnold*, 8 C. B. 632.

(*p*) 1 Exch. 479.

rity, and in the *same course of dealing* between the parties. In delivering judgment in this case the Court of Exchequer drew a distinction between a claim or demand comprising several distinct and independent matters, which may clearly be recovered by separate suits in the County Court (*q*), and a running account consisting, indeed, of various items, but which is meant to constitute one entire debt. Where, in the case of a tradesman's bill, they remarked, one item is connected with another in this sense, that the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another and form one entire demand, the plaintiff cannot split these items into separate causes of action, but must sue for the aggregate amount.

The case of *Grimbly* v. *Aykroyd* has, since its decision, been recognised as a leading authority with reference to that portion of the 63rd section of the County Courts Act, which forbids a plaintiff to "divide" his "cause of action," with a view to giving jurisdiction to the County Court (*r*). There are, indeed, some portions of the judgment there delivered, which seem to lead considerably beyond the proposition just stated as having been clearly established by it; there are remarks by the Court which seem to shew that a correct test for determining whether or not the various items of a claim really constitute one "cause of action" would be this: would or would not a superior Court order separate and distinct actions brought *there* in respect of such several items to be *consolidated* (*s*)? if they would, the aggregate demand

(*q*) See *Brunskill* v. *Powell*, 1 L. M. & P. 550; *Kimpton* v. *Willey*, Id. 280; *Wickham* v. *Lee*, 12 Q. B. 521.

(*r*) Judgment, *Wood* v. *Perry*, 3 Exch. 445; per *Erle*, J., *Jones* v. *Pritchard*, 6 D. & L. 530. See also *Box* v. *Green*, 9 Exch. 503.

(*s*) See 2 Chitt. Arch. Pr., 8th ed., 1174.

composed of such items could not be split up, so as to be brought within the cognisance of the County Court.

Let us next suppose a case somewhat analogous to that just considered, but in reality to be decided on other grounds; let us suppose that a banker receives a sum of money, belonging to different persons severally, from their agent, who is charged to divide it amongst them in distinct proportions; let us further suppose that the aggregate sum paid into the bank exceeds 50*l.*, but that the several undivided portions of which it is composed fall respectively within that limit, it is, under the circumstances stated, clear, of course, that an action would not lie in the County Court at suit of the agent for the entire deposit paid into the bank, inasmuch as that would be without the jurisdiction of the inferior tribunal; but it is also clear, that an action could not be sustained there for his several share by any one of the individuals beneficially interested in the fund, upon this ground, that the original contract was not with him, but was between the banker and the agent (*t*).

Again, it is a common practice for farmers and graziers to send their cattle to a particular salesman, who perhaps sells to one individual a lot of beasts belonging to many different owners. Now, here the contract of sale is between the salesman and the purchaser, so that each separate owner could not sue the latter for the price of his cattle (*u*). Cases like the foregoing are not, however, to be decided by reference to the wording of the County Court Acts, but upon elementary principles, on which the law of contracts is dependent.

But, although a cause of action cannot be divided in order As to aban-

(*t*) See *Pinto* v. *Santos*, 5 Taunt 447.

(*u*) Per *Martin*, B., *Walshe* v. *Provan*, 8 Exch 852.

doning the excess.

to entitle a claimant to sue in the County Court, we must, nevertheless, bear in mind that a plaintiff claiming more than 50*l.* is, by the 63rd sect. of the 9 & 10 Vict. c. 95, allowed to *abandon the excess* of his demand, and to sue for the residue in the County Court; and, if he mean to adopt this course, he ought to express such his intention upon the summons or upon the particulars of demand (*x*) annexed thereto, otherwise the case of *Avards* v. *Rhodes* (*y*), already cited, would seem to shew that he might be met, at the hearing of the cause, with this objection, that his claim exceeded the specified limit of 50*l.*, which would at once oust the jurisdiction of the Court.

Before making up his mind, however, thus to abandon the residue of his demand, a creditor ought to look narrowly at the concluding words of the above-mentioned 63rd sect. of the County Courts Act, which provide, that, in the event of his doing so, "the judgment of the Court" upon his plaint "shall be *in full discharge* of all demands in respect of" the "cause of action," and that "entry of the judgment shall be made accordingly;" the consequence of abandoning the excess of his demand over the 50*l.* will consequently be to preclude the plaintiff from afterwards recovering it by action, and, should the defendant have any ground of set-off available, such abandonment may be attended with additional inconvenience and prejudice. This results from the fact, that a plaintiff cannot compel his adversary to plead a set-off; and should he abandon the excess of his demand, so as to bring his claim within the jurisdiction of the County Court, and then be met by a set-off, he might of course be altogether defeated in his action, and, at all events, the

(*x*) Ante p. 63, n. (*o*). As to the summons and particulars of demand, see post, Chap. 4, Sect. 2.

(*y*) 8 Exch. 312.

claimant would find himself exposed to the risk of having his demand reduced, not merely by the amount abandoned, but also by the amount of the set-off. If, on the other hand, the defendant does not plead his set-off to the plaintiff's reduced demand, but sues for it in a cross action, then the plaintiff will be debarred in that action from setting-off any of the abandoned portion of his original claim by the express words of the 63rd section of the Act (*z*).

In practice, therefore, a plaintiff will do well to avail himself of the power of abandonment above alluded to, only where the excess abandoned is unimportant in amount, or in cases where no set-off can be established, and where the recovery of any part of his demand might be jeopardised by delay.

Cases excluded from jurisdiction of County Court.

2. I have thus far been adverting to the jurisdiction of the County Court in respect of any "debt, damage, or demand," not exceeding the sum of 50*l.*, "on balance of account or otherwise;" it must not be supposed, however, that the County Court can inquire into any "demand" whatsoever, provided the damages claimed thereby fall within the prescribed limit. A reference to the 58th sect. of the 9 & 10 Vict. c. 95, already set out (*a*), and to the 13 & 14 Vict. c. 61, s. 17 (*b*), will shew that several important classes of cases are taken *wholly* out of the jurisdiction of the County Court; and, that over some other cases that Court can exercise no jurisdiction, save *by consent* of the litigating parties.

(*z*) See per *Maule*, J., *Woodhams* v. *Newman*, 7 C. B. 666–7.

(*a*) Ante, p. 59.

(*b*) By this section jurisdiction may be given by consent, where the claim is for a "debt," "damage," or "demand" exceeding 50*l.*, or where "the title to land, whether of freehold, copyhold, leasehold, or other tenure, or to any tithe, toll, market, fair, or other franchise, shall be in question."

The cases which are thus wholly, or save by consent of parties, excluded from the jurisdiction of the County Court are as follow:—Any action of ejectment; or in which the title to a corporeal or incorporeal (*c*) hereditament, or to any toll (*d*), fair, market, or franchise shall be in question; any action in which the validity (*e*) of a devise, bequest, or limitation under a will or settlement may be disputed; any action for a malicious prosecution (*f*), or for libel, slander, criminal conversation, seduction, or breach of promise of marriage.

The cases cited at the foot of this page may be consulted, if necessary, with reference to the several matters of minor importance included in the above list, to which they respectively apply. Two questions, however, of considerable interest to the practitioner demand consideration in connection with that class of cases in which the "title" to land is brought in question before the County Court:—1st. How is the judge of that Court to act when the title to land is alleged to be or is in question? 2ndly. When may it properly be said to be so?

By way of answer to the former of these questions, I would say, that the plaintiff may possibly, in his particulars, so far exhibit the true substance and nature of his claim, as altogether to exclude it from the cognisance of the Court to which he would refer it, and here of course no practical

(*c*) See *Stephenson* v. *Raine*, 2 E. & B. 744; *Davis* v. *Walton*, 8 Exch. 153; *Baddeley* v. *Denton*, 4 Exch. 508; *Steuart* v. *Jones*, 1 E. & B. 22.

(*d*) *Reg.* v. *Everett*, 1 E. & B. 273; *Hunt* v. *Great Northern R. C.*, 2 L. M. & P. 268; *S. C.*, 10 C. B. 900.

(*e*) The County Court judge has jurisdiction, however, in regard to a claim for a legacy, when its "validity" is not disputed, post, p. 71. See also *Gibbon* v. *Gibbon*, 22 L. J., C. P., 131; *Winch* v. *Winch*, 13 C. B. 128; *Longbottom* v. *Longbottom*, 8 Exch. 203; *Fuller* v. *Mackay*, 2 E. & B. 573.

(*f*) *Jones* v. *Currey*, 2 L. M. & P. 474.

difficulty as to the mode of dealing with the claim can be felt (*g*).

Again, the objection to the jurisdiction, founded on the subject-matter in dispute, though not appearing on the particulars or summons, may be raised by the defendant at the hearing; and, if so, the duty of the judge will be, in the first instance, to inquire into the case, with a view to satisfying himself whether the title does really come in question or does not. Should he think that it does come in question, he will dismiss the summons; should he think that it does not come in question, he will hear and adjudicate upon the claim: the remedy open to the party dissatisfied with the decision of the judge being by application to one of the superior Courts, in the former case, for a mandamus, and, in the latter, for a prohibition, to issue to the County Court (*h*). It is not, however, absolutely incumbent on a defendant sued in the County Court, who knows that the title to land must come in question, to wait until the hearing, in order then to put forward the objection. It is quite open to him, if so minded, upon being served with process out of the inferior court, to apply at once for a prohibition to restrain the County Court judge from proceeding further with the case (*i*), the application being supported by proper affidavits.

And now, as to the second of the two questions mooted in the preceding page, viz. when or under what circumstances may the title to a corporeal hereditament properly be said to be in question? It is clear that a mere colourable pretence of title, or a claim to what can have no valid existence in law, will not suffice to oust the jurisdiction of the County Court;

(*g*) See *Sewell* v. *Jones*, 1 L. M. & P. 525.

(*h*) *Latham* v. *Spedding*, 2 L. M. & P. 378; Judgment, *Thompson* v. *Ingham*, 1 L. M. & P. 219; *Mountnoy* v. *Collier* 1 E. & B. 630; *Hardy* v. *Walker*, 23 L. J., Exch., 57.

(*i*) Per *Wightman*, J., *Sewell* v. *Jones*, 1 L. M. & P. 525. See *Wadsworth* v. *Queen of Spain*, 17 Q. B. 171.

the title must be brought bonâ fide in question (*k*). Thus, if a tenant be sued for use and occupation, and rely on the fact, that his landlord's title has expired during the tenancy, evidence of such fact will oust the jurisdiction of the County Court (*l*). Again, a plaint was entered in a County Court for a trespass in removing plaintiff's goods from certain rooms of a house, the residue of which was occupied by the defendant; and it appeared that the real question in dispute was, whether the plaintiff had let the whole house to the defendant, or had reserved for himself the rooms in which the trespass was alleged to have been committed: upon these facts it was held, that a question of title to a "corporeal hereditament" had come in question, and that the County Court judge had no jurisdiction to adjudicate upon the plaint (*m*).

So, if a party were charged in a County Court with a liability arising by reason of his ownership of land, and he disclaimed the ownership, a question of title would be raised, and the jurisdiction of the Court would, (in the absence of any enactment overriding the County Court Act (9 & 10 Vict. c. 95),) be ousted (*n*).

Besides the matters already noticed as falling within the cognisance of the County Court, that Court has some peculiar branches of jurisdiction, which are, in their nature, equitable rather than *legal*, or within the direct cognisance of our common law. Thus, by the 9 & 10 Vict. c. 95, s. 65, coupled with the 1st section of the Extension Act (13 & 14 Vict.

(*k*) *Lloyd* v. *Jones*, 6 C. B. 81.

(*l*) *Mountnoy* v. *Collier*, 1 E. & B. 630.

(*m*) *Chew* v. *Holroyd*, 8 Exch. 249.

(*n*) *Reg.* v. *Harden*, 2 E. & B. 188. But the County Court has still cognisance of replevin, even where the title to land does come in question: *Reg.* v. *Raines*, 1 E. & B. 855. See also *Earl of Harrington* v. *Ramsay*, 8 Exch. 879, and 2 E. & B. 669.

c. 61), the County Court may inquire into any demand not exceeding in amount 50*l.*, in respect of "the whole or part of the unliquidated balance of a partnership account," or "of a distributive share" of personal estate "under an intestacy," or "of any legacy under a will." It follows, therefore, that a partner suing his copartner in a County Court cannot be met by the objection, which would be fatal to him in one of the Courts at Westminster, of a subsisting partnership (*o*). Neither can a legatee, suing in a County Court, be met by the objection taken in *Deeks* v. *Strutt* (*p*), that an action at law will not, in the absence of special circumstances, lie for a legacy.

The inferior tribunal of which I have been speaking, besides its jurisdiction by suit or action at law, is also, in some cases, invested with power to afford redress of an extraordinary kind, as on interpleader, or where the possession of any house, land, or other corporeal hereditament is unlawfully withheld by the tenant from his landlord; cases requiring the exercise of these peculiar powers do not, however, fall properly within the scope or design of the present section, although some more specific allusion to them will be made when I come to treat of Extraordinary Remedies generally (*q*).

Costs of plaintiff suing in superior Court—how affected by the County Court Acts.

The consequence of suing in a superior Court for a debt, damage, or demand recoverable in the County Court may sometimes be serious, so far as regards the right to costs of the plaintiff if successful, such consequence flowing from

(*o*) Compare *Rees* v. *Williams*, 7 Exch. 51, and *Fuller* v. *Mackay*, 2 E. & B. 573, with *Bovill* v. *Hammond*, 6 B. & C. 149, where Lord *Tenterden*, C. J., says, that "between partners, whether they are so *in general*, or *for a particular transaction only*, no account can be taken at law."

(*p*) 5 T. R. 690; *Jones* v. *Tanner*. 7 B. & C. 542; with which compare *Pears* v. *Wilson*, 6 Exch. 833, and cases cited ante, p. 68, n. (*e*).

(*q*) Post, Chap. 5.

certain express statutory provisions, viz. the 13 & 14 Vict. c. 61, ss. 11 and 12, and 15 & 16 Vict. c. 54, s. 4, the design of which is to check the bringing of trivial actions in the superior Courts. The general effect of these clauses(r) is as follows:—

Where a plaintiff suing in a superior Court on a cause of action within the jurisdiction of the County Court recovers not more that 20*l.* in contract, or 5*l.* in tort, he shall have no costs, unless, indeed, the defendant suffers judgment by default(s), or unless, after verdict, the Judge certifies either that the cause of action was one for which no plaint could have been entered in the County Court, or that, in his opinion, there was a sufficient reason for suing before the superior tribunal.

If, however, the Judge does not thus certify at the trial, the plaintiff must, in order to get his costs, make application to the Court in banc, or to a Judge at chambers, and establish satisfactorily one or other of the two grounds for the allowance of costs just mentioned; or else he must shew that the action has been already removed from the County Court by writ of certiorari, or that the cause of action is one falling within the concurrent jurisdiction of the superior and County Courts, by virtue of the 9 & 10 Vict. c. 95, s. 128.

This concurrent jurisdiction is permitted by the section just mentioned in certain cases, viz.:—

1. Where the plaintiff dwells more that twenty miles from the defendant; or,

2. Where the cause of action did not arise *wholly or in*

(r) For more detailed information respecting the above sections, the reader is referred to Broom's Pract. County Courts, Chap. 2, Sect. 2.

(s) See *Glynne* v. *Roberts*, 9 Exch 253.

some material point (*t*) within the jurisdiction of the Court within which the defendant dwells or carries on his business at the time of the action brought; or,

3. Where any officer of the County Court shall be a party, except in respect of any claim to any goods and chattels taken in execution of the process of the Court, or the proceeds or value thereof (*u*).

It is not my intention to enter here into a minute examination of the provisions of the County Court Acts above cited—a cursory glance at them will shew, that, although in certain cases they affect the right to costs of a successful plaintiff, they do not vest any *exclusive* jurisdiction in the County Court.

(*t*) See *Wood* v. *Perry*, 3 Exch. 442; *Norman* v. *Marchant*, 7 Exch. 723; *Wilde* v. *Sheridan*, 21 L. J., Q. B., 260.

(*u*) With reference to the three classes of cases mentioned in the text, see Broom's Pract. County Courts, pp. 57—61.

CHAPTER III.

OF THE NATURE OF RIGHTS ENFORCEABLE BY ACTION.

In this Chapter I propose to inquire generally (*a*) as to the nature of that right which gives a remedy at law. To prevent misconception, however, during the progress of this inquiry, I would at the outset observe, that the remedy obtainable in a Court of law is in kind either ordinary or extraordinary,—it may be by action, or it may be by mandamus, by summary application to the equitable jurisdiction of the Court, or in various other ways, which will be specified in the concluding Chapter of this Book. At present, however, I shall restrict myself to considering under what circumstances the remedy by action at law is available to an injured party, and what may be the true definition and meaning of the term 'right of action' in connexion with legal science.

Right of action—what.

A 'right of action,' then, may, in the words of the Roman law, be defined to be the *jus persequendi in judicio quod sibi debetur* (*b*),—it exists wherever a legal claim to damages, or to the recovery of some specific thing, has accrued;

(*a*) The inquiry as to the nature of legal rights and remedies is here pursued *generally*. I shall return to this subject hereafter when treating of Contracts (post, Bk. II.,) and of Torts (post, Bk. III.,) respectively.

(*b*) I. 4. 6. pr., adopted in Co. Litt. 285. a. In the Roman or Civil Law, "the word *actio* was used originally to denote the particular form in which certain legal proceedings were carried on; from this it was transferred to signify the legal remedy by which every person might enforce his right:" Phillimore, Introd. to Rom. L. p. 61.

the action itself being the formal and prescribed mode of procedure whereby the right is vindicated or enforced in a Court of law (*c*).

It follows at once, from the very terms of the definition just given, that, before commencing an action in any given case, the practitioner must apply himself to consider, in the first place, whether any right of action in truth exists; and, if this question be answered affirmatively, then, 2ndly, what may be the proper and specific method of enforcing it (*d*).

Now, it is not every substantial wrong, still less every imaginary grievance, which affords a right of action for redress. Nor is it true, that for every kind of damage or loss occasioned by the act of another, a remedy is given by the law. It not unfrequently happens, that damage, palpable and undeniable though it be, is, in technical phraseology, *damnum sine injuriâ*, that is, damage unaccompanied by any tortious or wrongful act whereof cognisance can be taken in a Court of justice.

Here, accordingly, it becomes at once necessary that I should define respectively the words *damnum* and *injuria*, or, at all events, that I should state in what precise sense, and with what signification, it is in this volume proposed to use them.

The word *injuria*, then, will be employed as signifying a 'legal wrong,' that is, a wrong cognisable or recognised as such by the law (*e*). The word *damnum*, on the other hand, will be used as signifying 'damage,' not necessarily pecuniary or perceptible, but appreciable, and capable, in legal contemplation, of being estimated by a jury.

Injuria.

Damnum.

(*c*) See further as to this, post, Chap. 4, Sect. 1.

(*d*) This latter question will be discussed, post, Chap. 4, Sect. 1.

(*e*) Omne quod non jure fit *injuria* fieri dicitur: Brisson. ad verb. Injuria. 1 Inst. 158. b.

Such being the sense properly assignable to the word 'damnum' and to 'injuria,' I shall proceed forthwith to establish, by apposite examples (*f*), this proposition, that *damnum sine injuriâ*, that is, damage unaccompanied by legal wrong, *is not actionable at law.*

Damnum sine injuriâ.

Of the particular kind of damnum just spoken of, the law of contracts does not readily afford us instances; because, there, the mere breach of a covenant or agreement between parties is in itself an injuria of which our law, acting in accordance with the most elementary principles of jurisprudence, will take notice (*g*). But when we turn to the consideration of torts or wrongs independent of contract, sufficient examples in affirmance of the proposition above laid down will be found, without much research, to present themselves.

In illustration of such damage might be mentioned the loss inflicted on a schoolmaster by the establishment of a rival school adjacent to his own, or on a millowner by the erection of a mill contiguous to his own, and the consequent loss of custom (*h*). Now, in neither of these cases is there any *tortious* element apparent, that is, any injuria or legal wrong upon which an action could be founded.

It would, moreover, be easy to shew that a man may, without incurring liability, so use his own property as to cause damage to his neighbour, *provided the damnum be not injuriosum.* For instance, the principle has often been recognised, that "one landowner cannot, by altering the condi-

(*f*) Such, I may remind the reader, seems to be the only legitimate mode of *proving* the proposition stated in the text. Reported cases furnish the best—often the only—evidence of what law is (ante, p. 20), and every judgment when delivered becomes part of the law of the land: Ram. Sci. Leg. Judg. p. 2; Id. Chap. 17.

(*g*) Post, Book II.

(*h*) 3 Bla. Com. 219; Leg. Max., 2nd ed., 151.

tion of his land, deprive the owner of the adjoining land of the privilege of using his own as he might have done before. Thus he cannot, by building a house near the margin of his land, prevent his neighbour from excavating his own land, although it may endanger the house; nor from building on his own land, although it may obstruct windows, unless, indeed, by lapse of time, the adjoining land has become subject to a right analogous to what, in the Roman law, was called a servitude" (*i*).

To take an instance of a different kind: A comment upon a literary production, exposing its follies and errors, and holding up the author to ridicule, will not be deemed a libel, provided such comment does not exceed the limits of fair and candid criticism, by attacking the character of the writer unconnected with his publication; and a comment of this description every one has a right to publish, although the author may suffer a loss from it (*k*). In such a case, although there be damnum, there is no injuria; and even the loss is that which the party ought to sustain, inasmuch as it is presumably the loss of fame and profits to which he was not fairly entitled (*l*). A fortiori, where words are uttered neither actionable per se, nor spoken with reference to a person in his trade or profession, nor productive of special damage, there is in law no injuria, and, consequently, no right of action (*m*).

Action for seduction.

Again, an action for seduction is in our law founded upon a fiction. The basis of this action, when brought even by

(*i*) Judgment, *Smith* v. *Kenrick*, 7 C. B. 565-6; *Humphries* v. *Brogden*, 12 Q. B. 739 and cases cited post, pp. 81-3.

(*k*) See per Lord *Ellenborough*, C. J., *Carr* v. *Hood*, 1 Camp. 355, n.; *McLeod* v. *Wakley*, 3 Car. & P. 311; 2 Selw. N. P., 10th ed., 1039—1040.

(*l*) Per Lord *Ellenborough*, C. J., *Carr* v. *Hood*, supra.

(*m*) See *Gallwey* v. *Marshall*, 23 L. J., Exch., 78; *Brown* v. *Smith*, 22 L. J., C. P., 151.

a father to recover damages for the seduction of his daughter, having "been uniformly placed from the earliest times not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of service of the daughter, in which service" the parent "is supposed to have a legal right or interest." It has, accordingly, always been held, that, in an action for seduction, loss of service must be alleged in the declaration and must be proved at the trial, or the plaintiff will fail, notwithstanding the production of evidence conclusive as regards the guilt of the defendant; for the wrong done by his act our law does not esteem per se as an injuria, using that word in its strict sense, but merely as *damnum sine injuriâ*, for which, consequently, an action will not lie (*n*).

Action for suing plaintiff by mistake.

In further illustration of the nature of *damnum sine injuriâ* may be mentioned the case of *Davies* v. *Jenkins* (*o*), which decides, that an action will not lie against an attorney, who, being retained to sue for a debt a person of the same name as the plaintiff, by mistake and without malice takes all the proceedings to judgment and execution inclusive against the plaintiff; in this case it will, of course, be obvious, that the individual thus sued by mistake would have a good defence to the action, and would, if successful, recover in it such costs as on taxation the law allows. If, however, it be asked, what further remedy he might have for the inconvenience and trouble occasioned him, the answer is, that, in point of law, if the proceedings were adopted purely through mistake, though injury may have resulted to him, it is *damnum absque injuriâ*, for which no

(*n*) *Grinnell* v. *Wells*, 7 M. & Gr. 1033; *Marys's case*, 9 Rep. 113 a; *Davis* v. *Williams*, 10 Q. B. 725; *Eager* v. *Grimwood*, 1 Exch. 61; *Harris* v. *Butler*, 2 M. & W. 539.

(*o*) 11 M. & W. 745, cited Leg. Max. 2nd ed. p. 152.

action would lie. Every defendant, against whom an action is unnecessarily brought, experiences some injury or inconvenience beyond what the costs will compensate him for (p).

Action for draining off water from plaintiff's well.

So, again, the case of *Acton* v. *Blundell* (q) specially illustrates the nature of *damnum sine injuriâ*. There it is laid down as a proposition generally true, that our law gives to the owner of land all that lies beneath its surface; whence it follows, that the owner may dig beneath such surface at his free will and pleasure; and if, in so digging, he casually does an injury to his neighbour—as by draining off the water from his well—such injury cannot, in the absence of any prescriptive right, become the foundation of an action.

We thus see that large and distinct classes of cases do occur, in which damage and loss are occasioned to an individual by the act of another, and yet no redress is given him by the law; but if the above cases, and others which might be mentioned to a like effect, were examined with due care, it would be found, that, in thus declining to recognise the validity of the claims for pecuniary compensation there put forth, our law acts in deference to principles wider in their operation, and of greater moment to the community at large, than those are, the authority of which it may, at first sight, appear to have impugned. To take, for instance, successively, the three cases which have been just put as illustrative of the nature of legal injuries and wrongs; as to the first, I would observe, that the existence of the fiction upon which an action for seduction with us is founded (r), seems

(p) Per *Rolfe*, B., 11 M. & W. 756. See *Cotterell* v. *Jones*, 11 C. B. 713.

(q) 12 M. & W. 324. See also *Roath* v. *Driscoll*, 20 Day, (U. S.) R. 533.

(r) The above remarks are offered with a view to explaining the existence of the fiction in question in our law—by no means in justification of its retention. It may reasonably be suggested that the right of action for seduction should either be abolished altogether, the wrongdoer being made amenable to crimi-

clearly referable to this elementary principle, that our law does not regard the quality of actions from the point of view which a moralist would select, it does not weigh them in his scales, nor does it allow the mere turpitude of an act, per se, to give it jurisdiction. It usually inquires, rather, whether any and what damage directly estimable by reference to a pecuniary standard has been sustained. Such is the rule which holds generally true in civil cases, although there are exceptions to it; as, where *malice* is recognised as an essential ingredient in an actionable wrong (*s*). I am not, however, aware that the truth of what has been just said is at all affected by the fact that a jury may and will, in many cases, be influenced in assessing damages for a wrong by a consideration of the motives which may have prompted to its commission (*t*).

In the second of the three instances above put—that viz. of an action brought unsuccessfully, but which, nevertheless, causes inconvenience and anxiety of mind—nay, even positive loss to a defendant,—the reasons why redress and pecuniary compensation for the inconvenience so caused cannot (at all events in the absence of any malicious or corrupt motive (*u*),) be enforced, would seem to be that our Courts of justice are open to all suitors who there seek to prosecute their claims in the manner prescribed by law, and that anything having a tendency to stifle or prevent such inquiry, ex. gr., the fear of being mulcted in heavy costs beyond that comparatively reasonable amount ascer-

nal justice, or if retained should be made independent of the fiction of loss of service.

(*s*) Post, Book III.

(*t*) Id., where I shall inquire how far the motive or intention is material in determining the legal quality and character of an act.

(*u*) See *Cotterell* v. *Jones*, 11 C. B. 713.

tained by taxation, according to the scale allowed by law, would be highly inexpedient.

In explanation of the last of the instances of *damnum sine injuriâ* above mentioned, a reference to the case of *Acton* v. *Blundell*(*x*) will shew, that, although under the circumstances then appearing, there was a primâ facie conflict between two great legal principles, the greater of these was, and justly, allowed to preponderate: the principles in apparent antagonism were the doctrine lying at the root of what is called the social compact, that the absolute owner of property may deal with it as he likes, and the rule which so restricts the use and enjoyment of property as to prevent injury—i e. *legal* injury—to a neighbour. In *Acton* v. *Blundell*, however, there was in fact no legal injury done, because no *prescriptive* right had been invaded, and therefore the case rests in truth upon this broad foundation, that every one may *innocently* enjoy his own property as he will.

Great care is, however, often necessary in determining whether or not a particular mode of enjoying property *is* innocent and lawful; and "the books of Reports," it has been said, "abound with decisions restraining a man's acts upon and with his own property, where the necessary or probable consequence of such acts is to do damage to others." The judgment in *Humphries* v. *Brogden*(*y*), whence the above extract is taken, will be found very instructive with reference to this subject. There it appeared that the surface of land (by which is meant the superficies and soil lying over the minerals) belonged to one man, whilst the minerals belonged to another; no evidence of title appeared to regulate or qualify the rights of enjoyment of the respective occupants, and the question was, whether the owner of the

Humphries v. *Brogden.*

(*x*) Ante, p. 79.

(*y*) 12 Q. B. 739, (where the previous authorities are noticed). See, also, *Hilton* v. *Whitehead*, Id. 734.

minerals might remove them without leaving support sufficient to maintain the surface in its natural state. Now, the jury in this case entirely negatived the existence of negligence on the part of the defendant who had worked the mines, and found that he had worked carefully and according to the custom of the country, but without leaving sufficient pillars or supports for the superincumbent soil.

Upon the facts and finding of the jury above set out, the Court of Queen's Bench gave judgment in favour of the plaintiff, and in doing so made some remarks which are apposite for my present purpose. If, they said (*z*), A., seised in fee of land next adjoining land of B., erect a new house on his land, "and part of the house is erected on the confines of his land next adjoining the land of B., if B. afterwards digs his land near to the foundation of the house of A., but not touching the land of A., whereby the foundation of the house and the house itself fall into the pit, still no action lies at the suit of A. against B., because this was the fault of A. himself that he built his house so near to the land of B., for he could not by his act hinder B. from making the most profitable use of B.'s own land (*a*):"—the case here put offering, consequently, an example of damnum absque injuriâ or damage unaccompanied by any actionable wrong. But, on the other hand, the Court proceed to remark, a man who has land next adjoining to mine cannot dig his own land so near to mine, that thereby my land shall fall into his pit; and for so doing, if an action were brought, it seems clear, on principles of natural justice, that it would lie. Now, although the existence of such a right to lateral support for land from the adjoining soil manifestly places a restraint on the enjoyment of the adjacent property, the existence and

(*z*) Citing 2 Rolle's Abr. Trespass (I), pl. 1.

(*a*) See *Wyatt* v. *Harrison*, 3 B & Ad. 871.

validity of the right in question may nevertheless be sustained by this simple reasoning, that "if the neighbouring owners might excavate their soil on every side up to the boundary line to an indefinite depth, land thus deprived of support on all sides could not stand by its own coherence alone," and infinite mischief might thus be caused to an innocent party (*b*).

Arguing by analogy from the legal proposition just stated, the Court of Queen's Bench, in *Humphries* v. *Brogden*, decided that the owner of the surface of land, while unencumbered by buildings and in its natural state, is entitled to have it supported by the subjacent mineral strata. "Those strata may of course be removed by the owner of them, so that a sufficient support for the surface is left; but, if the surface subsides, and is injured by the removal of these strata, (although, on the supposition that the surface and the minerals belong to the same owner, the operation may not have been conducted negligently, nor contrary to the custom of the country), the owner of the surface may maintain an action against the owner of the minerals for the damage sustained by the subsidence" (*c*).

With the foregoing case of *Humphries* v. *Brogden* should be compared that of *Smith* v. *Kenrick* (*d*), which decided

(*b*) If the owner of land builds two houses upon it, adjoining each other, so as to require mutual support, and a subdivision of the land takes place, the mutual right to support will still be enjoyed by each owner against his neighbour · *Richards* v. *Rose*, 23 L. J., Exch., 3. See also judgm. *Chauntler* v. *Robinson*, 4 Exch. 170; *Jeffries* v. *Williams*, 5 Exch. 792, 800.

(*c*) The case of *Humphries* v *Brogden*, supra, it has been remarked, shews clearly that the title to the surface of land may be dissevered from that to the minerals, so that the surface and the minerals may become separate tenements; but the *presumption is to the contrary*. Judgment, *Keyse* v. *Powell*, 2 E. & B 144.

(*d*) 7 C. B. 515, 564; *Clegg* v. *Dearden*, 12 Q B. 576.

that it is "the natural right of each of the owners of two adjoining coal-mines—neither being subject to any servitude to the other—to work his own in the manner most convenient and beneficial to himself, although the natural consequence may be, that some prejudice will accrue to the owner of the adjoining mine, so long as that does not arise from the negligent or malicious conduct of the party."

I have adverted to the above class of cases at some length, because they are obviously of much practical importance, and serve clearly to shew what embarrassing and difficult questions may present themselves where distinct rights, which in their enjoyment encroach upon each other, are claimed by different individuals; the points to be decided in such cases usually being—which of the two rights is subservient to the other? Is the alleged wrongful act *damnum absque injuriâ* and irremediable at law?

In deference to the authorities already cited, I think we may now assume that *damnum sine injuriâ* is not actionable at law. And, on this assumption, I shall proceed to illustrate and explain the correlative proposition—that *injuria sine damno* (to adopt technical phraseology) does very frequently suffice as the foundation of an action: the above phrase being used to indicate a wrong—remediable at law—though not productive of *actual* damage to the complainant. The phrase applies only where a *legal* injury has been done, or where a *legal* right has been violated.

Injuria sine damno.

As explanatory of what is meant by *injuria sine damno*, I cannot, in the first instance, do better than refer to the great case of *Ashby* v. *White* (e), which has much interest in a constitutional as well as in a strictly legal point of view. It is, moreover, precisely in point for my present purpose,

Ashby v. *White.*

(e) 2 Lord Raym. 953, and 1 Smith, L. C. 105.

inasmuch as it shews clearly that *it is actionable to deprive a man of a right given him by law, although no damage, loss, or injury has been thereby occasioned. Ashby* v. *White* was an action against a returning officer for refusing to receive the plaintiff's vote at the election of burgesses to serve in Parliament; and it was held by Lord *Holt*, C. J., and the House of Lords, that the action well lay, although the candidates in whose favour the vote had been tendered were in fact elected; the decision proceeding upon this ground, that the plaintiff had a legal right and privilege to give his vote; and that, having been disturbed in the enjoyment of such right, an action was maintainable at his suit against the party causing the disturbance.

In the course of his celebrated judgment in this case, Lord *Holt*, after first shewing that the right of voting at the election of burgesses is a privilege of much moment, and that the deprivation of it is an *injury*, thus proceeds: "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it. And, indeed, it is a vain thing to imagine a right without a remedy, for *want of right and want of remedy are reciprocal.*" Lord *Holt* then applies himself to one particular argument, which had been urged, viz. that an action was not maintainable because no actual hurt or damage had been done to the plaintiff (inasmuch as, although his vote was rejected, the candidates for whom it had been tendered were in fact elected as representatives); and observes, that, "surely every injury imports a damage, though it does not cost the party one farthing;" and it is impossible to prove the contrary, he adds, "for a damage is not merely pecuniary, but *an injury imports a damage where a man is thereby hindered of his right.*" Now, it is quite clear, that, in thus speaking, Lord

Holt uses the term "injury" as synonymous with "injuria" in its *strict* sense, i. e. as signifying a wrong recognised as such by the law; and when so understood, the proposition which he lays down, viewed by the light of subsequent decisions, does not seem to be at all too broadly stated.

With the above case of *Ashby* v. *White* should, however, be compared that of *Pryce* v. *Belcher* (*f*), where a question was raised, but not positively decided, whether or not *malice*, which was expressly alleged in *Ashby* v. *White*, be essential to support an action such as was there brought. The point thus mooted was not however settled in *Pryce* v. *Belcher*, because, in that case, it appeared that the plaintiff was not properly entitled to vote at all, by reason of his non-compliance with the requirements of a particular enactment; and, consequently, the Court held, that the rejection of his vote by the returning officer, although wrongful, could not be considered as amounting to a violation of anything capable of being regarded in law as a right.

Marzetti v. *Williams.*

Another important and indeed leading case upon this subject of *injuria sine damno* is that of *Marzetti* v. *Williams* (*g*), which decided that an action will lie against a banker, having sufficient funds in his hands belonging to a customer, for refusing to honour his cheque, although the customer did not thereby sustain any actual loss or damage. Here the declaration was framed in tort for the breach of duty cast by the custom of trade upon a banker; but, it is clear, that the form of action might have been assumpsit, founded upon the contract implied by law as existing between a customer and his banker, that the latter will pay

(*f*) 3 C. B. 58; *S. C.*, 4 C. B. 866.

(*g*) 1 B. & Ad. 415. But it seems clear, that the banker might take a reasonable time to satisfy himself as to the genuineness of the check, if presented under suspicious circumstances, see per *Maule*, J., *Roberts* v. *Tucker*, 16 Q. B. 577.

cheques drawn by the former, provided he has in his hands sufficient funds for that purpose. The case of *Marzetti* v. *Williams* accordingly may be cited as an authority to shew, that, in an action purely ex contractu, if there be a breach of contract proved, nominal damages, at all events, must be recoverable (*h*).

In actions founded upon contract, indeed, the general rule is, as I shall hereafter shew, that injuria sine damno is actionable; in an action of assumpsit, for instance, there can be no doubt that a party is entitled to proceed for nominal damages for a breach of contract, though no damage may really have been sustained (*i*).

Without, however, incurring any risk of repetition, cases of various kinds and complexions, differing, moreover, from those which have been hitherto cited, might easily be adduced to establish the proposition just stated: thus a bare trespass to land (*k*),—the infringement of a patent or of a copyright (*l*), might be suggested in support or illustration of it.

So, it has been held, that the mere invasion, unaccompanied by special damage, of the right to a trade mark is a valid ground of action in a Court of law; and, if proved, will entitle the plaintiff to some, though perhaps only nominal, damages. It will be seen, indeed, in looking at the class of cases now alluded to (*m*), that the intention to

(*h*) Per *Parke*, J., 1 B. & Ad. 425. See also *Randall* v. *Moon*, 12 C. B. 261, and cases there cited; *Godefroy* v. *Jay*, 7 Bing. 413; *Street* v. *Blay*, 2 B. & Ad. 456; *Van Wart* v. *Woolley*, 1 Moo. & M. 520; *S. C.*, 3 B. & C. 439; *Nosotti* v. *Page*, 10 C. B. 643.

(*i*) Per. *Erle*, J., *Goodwin* v. *Cremer*, 22 L. J., Q. B., 30, 32.

(*k*) See Lord *Holt's* judgment in *Ashby* v. *White*, as published separately, 1837. See also this judgment as reported Ld. Raym. 938; 3 Bl. Com. 120, 209; post, p. 89, n. (*t*).

(*l*) *Novello* v. *Sudlow*, 12 C. B. 177.

(*m*) *Blofield* v. *Payne*, 4 B. & Ad.

deceive has, under the circumstances there appearing, been held to be an essential ingredient in the right of action; but they are not, on that account, the less illustrative of the truth and meaning of the rule now under review.

The following examples, taken indifferently from various branches of the law, will be found still further to illustrate this particular part of our subject:—

A libel has been defined to be "a malicious defamation, expressed in printing or writing, or by signs, pictures, &c., tending to injure the reputation of another, and thereby exposing such person to public hatred, contempt, or ridicule" (*n*). This malicious defamatory statement, when published, constitutes an injuria whence the law will imply damage (*o*).

So, if a landlord distrains upon his tenant for more rent than is due, an action on the case will lie against him, and nominal damages will be recoverable, although the goods distrained are of less value than the rent really due; the reason being, that the landlord is guilty of a wrongful act: and though "no *real* damage was sustained, yet there was a *legal* damage and cause of action" entitling the plaintiff to a verdict (*p*).

Again, let us suppose that the plaintiff in an action has obtained judgment and issued a writ of execution against the person of the defendant, and further, that this writ has been placed in the hands of the sheriff to be executed, the plaintiff will then have a right to the detention of the body of his debtor from the moment at which his capture can be

410; *Crawshay* v. *Thompson*, 4 C. B. 357; *Rodgers* v. *Nowill*, 5 C. B. 109; *Morison* v. *Salmon*, 2 M. & Gr. 385.

(*n*) 2 Selw N. P., 10th ed., 1038, citing *Digby* v. *Thompson*, 4 B. & Ad. 821.

(*o*) 2 Selw. N. P., 10th ed., 1044.

(*p*) *Taylor* v. *Henniker*, 12 Ad. & E. 488, 492.

effected, continuously, until payment of the debt or until the discharge of the defendant in some manner authorised by law. If, then, the sheriff negligently omits to arrest when he might have done so, or if, having arrested the defendant, he wrongfully suffers him to escape for ever so short a time, and afterwards recaptures him, the plaintiff will have a right of action against the sheriff without proof of any actual damage (*q*); the reason being, that, in such a case, the law implies damage, on the principle laid down by Lord *Holt* in *Ashby* v. *White* (*r*). If, indeed, the sheriff, after an escape, retake the judgment debtor on 'fresh,' that is, immediate, pursuit, this fact will be pleadable in bar to an action against the sheriff for an escape; because, in that case, the debtor is supposed, by a very pardonable fiction, never to have been out of custody, inasmuch as otherwise great hardship might be entailed upon the sheriff (*s*).

Acts of trespass evidencing title.

There is another important class of cases which can hardly be passed over in silence, whilst taking notice of the strict legal meaning of the word *injuria*, I allude to those where it is material to the preservation of a right that its invasion, although productive of no positive or appreciable damage, should not be tolerated or suffered with impunity. Thus, trespass qu. cl. fr. is maintainable for an entry on the land of another, though no real damage be occasioned thereby (*t*), one main reason being, that repeated acts of going over the land might eventually be relied upon as evidence of title to do so, and thereby the *right* of the plaintiff to the absolute enjoyment of the land might be injuriously affected. So, in

(*q*) *Clifton* v. *Hooper*, 6 Q. B. 468; with which compare *Williams* v. *Mostyn*, 4 M. & W. 145.

(*r*) Ante, p. 85. Argument, *Clifton* v. *Hooper*, supra.

(*s*) *Rigeway's case*, 3 Rep. 52. Judgment, *Arden* v. *Goodacre*, 11 C. B. 375-6.

(*t*) *Twyman* v. *Knowles*, 13 C. B. 222, offers a good illustration of this proposition.

an action by a commoner for a trespass to his common, evidence need not be given of the actual exercise of rights of common by the plaintiff(*u*).

Rochdale Canal Co. v. King.

In *The Rochdale Canal Company* v. *King*(*x*), the declaration (which was in case) stated that a certain canal had been made by the plaintiffs in pursuance of the stat. 34 Geo. 3, c. 78; by the 113th section of which the owners of land, within the distance of twenty yards from the canal, were empowered to draw water from it, by means of pipes, for the supply of their steam engines, and for "the sole purpose" of condensing the steam used for working such engines; the declaration charged that the defendants had "deceived and defrauded the plaintiffs" in this, to wit, that they had used the water drawn from the canal for purposes other than that allowed by the Act, and that the navigation of the canal had been thereby impeded and obstructed. No proof of damage at all, however, was given at the trial, and the question, under these circumstances, was, whether or not the action at suit of the company was maintainable. It was held to be so, on the ground—1st, that the company, being invested by the legislature with certain rights, might, in accordance with the rule laid down in *Ashby* v. *White*(*y*), sue for an invasion of them, without giving evidence of express damage; 2ndly, that the general principle here applied,—that, although no appreciable damage might possibly be sustained in the particular instance by the wrongful act complained of, yet, inasmuch as the repetition of such act might be made, in time, the foundation of a claim to do it,

(*u*) Per *Taunton*, J., 1 B. & Ad. 426; *Wells* v. *Watkins*, 2 W. Bl. 1233; *Pindar* v. *Wadsworth*, 2 East, 154; 3 Steph. Com. 463-4; 1 Wms. Saund. 346 a; Leg. Max., 2nd ed., 155; see *Kidgill* v. *Moor*, 9 C. B. 364.

(*x*) 14 Q. B. 122; *S. C.* (in error) Id. 136; *Wood* v. *Waud*, 3 Exch. 748, 780; *Dickinson* v. *The Grand Junction Canal Co.*, 7 Exch. 282; *Northam* v. *Hurley*, 1 E. & B. 665.

(*y*) Ante, p. 85.

damage, in law, had already been suffered by the plaintiffs, in respect of which an action was maintainable.

To conclude this part of my subject, then, having reference to *injuria sine damno*, I will allude merely to two additional authorities which are directly in support of what has been said: 1st, to *Embrey* v. *Owen* (*z*), which was an action on the case for diverting water from a stream, and where the Court in giving judgment observe that "actual perceptible damage is not indispensable as the foundation of an action; it is sufficient to shew the violation of a right, in which case the law will presume damage." 2ndly, to the judgment of Mr. Justice Story in *Webb* v. *The Portland Manufacturing Company* (*a*), (which was also an action for diverting water,) where that able jurist thus expresses himself with regard to the first question which arose in the case, viz. whether, to maintain the pending suit, it was essential for the plaintiff to establish that any actual damage had been sustained by him? "I can very well understand that no action lies in a case where there is *damnum absque injuriâ* (*b*), that is, where there is a damage done without any wrong or violation of any right of the plaintiff. But I am not able to understand, how it can correctly be said, in a legal sense, that an action will not lie, even in case of a wrong or violation of a right, unless it is followed by some perceptible damage which can be established as a matter of fact; in other words, that *injuria sine damno* is not actionable. On the contrary, from my earliest reading, I have considered it laid up among the very elements of the common law, that, wherever there is a wrong, there is a remedy to redress it; that every injury

(*z*) 6 Exch. 353, followed in *Dickinson* v. *The Grand Junction Can. Co.*, 7 Exch. 282, 305.

(*a*) 3 Sumner (U.S.) R. 189, where many of the decisions in our Courts are cited and considered.

(*b*) Ante, p. 76.

imports damage in the nature of it; and if no other damage is established, the party injured is entitled to a verdict for nominal damages. A fortiori, this doctrine applies where there is not only a violation of a right of the plaintiff, but the act of the defendant, if continued, may become the foundation, by lapse of time, of an adverse right in the defendant; for then it assumes the character, not merely of a violation of a right, tending to diminish its value, but it goes to the absolute destruction and extinguishment of it." Actual perceptible damage, continues Dr. Story, is not indispensable as the foundation of an action. The law tolerates no further inquiry than whether there has been *the violation of a right.* If so, the party injured is entitled to maintain his action for *nominal damages* in vindication of his right (*c*).

The examples above cited will probably be thought to have established this proposition, that *injuria sine damno* is, in a very large class of cases, actionable at law; there are indeed, as will hereafter appear (*d*), many wrongful acts, i. e. acts not merely morally wrong and indefensible but even contra legem, which give no *right of action* by our law, *unless* productive of special and substantial damage to the complainant; for instance, the breach of a public duty or the nonfeasance of something required to be performed by the statute law, would not be actionable at suit of one who had sustained no damage by reason of the breach of duty or of the nonfeasance (*e*). So, again, mere negligence could not give a right of action unless damage were caused thereby or resulted therefrom; and where words are spoken not actionable in themselves, special damage must in general be not only averred in the declaration but proved at the

(*c*) Judgment, 3 Sumner (U. S.) R. 189; *Fay* v. *Prentice*, 1 C. B. 828.

(*d*) Post, Book III.

(*e*) Id. ibid.

trial, in order that an action may be maintainable; in these and similar cases it has been sometimes said, that *injuria* and *damnum* must combine in order to constitute a right enforceable by action. Regard being had, however, to the meaning assigned to each of those words at p. 75, it would seem more correct to say, that in none of the cases just alluded to does the alleged wrong, unless when accompanied by substantial damage, fill out the true measure and conception of a legal *injury*.

Damnum et injuria *may* fail to give a right of action.

But, besides cases such as have been hitherto noticed, others doubtless present themselves, the distinctive peculiarity of which might be exhibited by saying, that the combination of the two ingredients of *damnum* and *injuria* will there fail, for peculiar reasons, to constitute a ground of action; to this class may properly be referred every case in which an injury done productive of damage to another is, in legal contemplation, *too remote* to entitle the injured party to redress(*f*). For instance, to revert for a moment to the case of an action for slander when the words used are not actionable *per se*, it has been held that the special damage relied upon to support the action should be a 'legal' and 'natural' consequence of the words spoken, ex. gr. it would not suffice to shew, that, by reason of them, some third person had been led to commit an assault and battery on the plaintiff(*g*).

Damage too remote.

It may, however, well be doubted whether it would be correct to say, that "an action is not maintainable for inducing another to break a contract—the act of inducing being done

(*f*) See upon this subject the maxim *in jure non remota causa sed proxima spectatur*, with the illustrations appended thereto, Leg. Max, 2nd ed., 165; *Wanstall* v. *Pooley*, 6 C. & F. 910, n

(*g*) Per Lord *Ellenborough*, C. J., *Vicars* v. *Wilcocks*, 8 East, 1; *Ashley* v. *Harrison*, 1 Esp. 48; *Taylor* v. *Neri*, Id. 386; *Green* v. *Button*, 2 Cr M. & R. 707.

maliciously and with intent to injure the plaintiff;" and yet, in this case, the breach of contract would be a wrongful act of the contracting party, which might, upon the authority of the two cases below cited (*h*), be regarded as neither a 'legal' nor a 'natural' consequence of the defendant's act. The point here adverted to was much considered in the late case of *Lumley* v. *Gye* (*i*), where the majority of the Court seemed to be of opinion, that an action on the case would lie under the circumstances just supposed, and that no conclusion to the contrary can fairly and accurately be drawn from previous decisions.

"Suppose," says *Crompton*, J., in that case, that "a trader, *with a malicious intent to ruin a rival trader*, goes to a banker or other party who owes money to his rival, and begs him not to pay the money which he owes him, and, by that means, ruins or greatly prejudices the party, I am by no means prepared to say, that an action could not be maintained, and that damages, beyond the amount of the debt if the injury were great, or much less than such amount if the injury were less serious, might not be recovered."

So, again, *Erle*, J., in the same case, remarks, "It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong,—as in violations of a right to property, whether real or personal, or to personal security; he who procures the wrong, is a joint wrongdoer, and may be sued either alone or jointly with the agent, in the appropriate action, for the wrong complained of." Now, the principle which governs such cases clearly is, that "he who maliciously procures a

(*h*) *Vicars* v. *Wilcocks*, 8 East, 1; *Ashley* v. *Harrison*, 1 Esp. 48.

(*i*) 2 E. & B. 216. An action will lie for enticing away a servant from his master's employ, under the Statute of Labourers (23 Edw. 3), Id.; 3 Bl. Com. 142; 5 Eliz. c. 4.

damage to another, by violation of his right, ought to be made to indemnify;" and this principle, by parity of reasoning, seems to hold, "whether he procures an actionable wrong or a breach of contract;" for "he who procures the nondelivery of goods according to contract may inflict an injury the same as he who procures the abstraction of goods after delivery, and both ought, on the same ground, to be made responsible" (*k*).

To return to the consideration of actions, solely and exclusively founded upon tort, the case of *Scott* v. *Shepherd* (*l*) will, on examination, be found to shew very clearly what, in actions of that class, is meant by saying that *damage* is or is not the 'natural' or 'probable' consequence of an act done. There, it was held, that trespass would lie against an individual who first set a squib in motion, which, after being thrown about in self-defence (and, therefore, lawfully) by various persons, at last put out the plaintiff's eye. The decision thus come to proceeding mainly upon this ground, that the parties intervening between the plaintiff and the defendant, having acted for their own safety and for self-preservation, could not be regarded as free agents; and that, consequently, there was, to use the expression of Chief Justice *De Grey*, a "chain of effects," which connected together the wrongdoer and the injured party, rendering the former responsible for the damage resulting from his tortious act to the latter.

To a like effect with the preceding case is that of *Vandenburgh* v. *Truax* (*m*); there the defendant had pursued

(*k*) 2 E. & B. 232, 233. In connection with *Lumley* v. *Gye*, cited in the text, see *Sedman* v. *Walker*, 1 Exch. 589; per cur. *Weller* v. *Baker*, 2 Wils. 422.

(*l*) 2 W. Bla. 892; 1 Smith L. C. 210. See *Gilbertson* v. *Richardson*, 5 C. B. 502.

(*m*) 4 Denio R. (U S.) 464; see also *Guille* v. *Swan*, 19 Johns. R. (U. S.) 381, cited Sedgw. Dam., 2nd ed., 79.

another with a view to assaulting him, and had thus driven him for protection into the plaintiff's shop, where, in consequence of the pursued party running against a cask of wine, injury was done. It was contended, upon these facts, that the defendant was not liable, inasmuch as the damage was occasioned, not directly by him, but by a third party, who might properly be regarded as altogether a free agent; the Court, however, took a different view of the matter before them, remarking that it may be laid down as a general rule, that, when "one does an illegal or mischievous act, which is likely to prove injurious to others, and when he does a legal act in such a careless and improper manner that injury to third persons may probably ensue, he is answerable in some form of action for all the consequences which may *directly and naturally* result from his conduct." Such being the general rule applicable in determining as to the liability of an individual under circumstances at all similar to those above detailed, I may remark, that the existence or non-existence of a *wrongful intent* on his part is not at all adverted to in it; the reason being, that, in the case put, the presence or absence of such intention would be *wholly immaterial* in regard to the abstract question, whether or not legal liability would be entailed by the particular act done(*n*).

Where proper remedy is by indictment.

The class of cases next to be noticed as illustrating the proposition that damnum et injuria will sometimes fail to give a right of action, depends upon the rule concisely laid down by Sir W. Blackstone(*o*), that "the law gives no private remedy for anything but a private wrong;" and, "therefore," as he proceeds to remark, "no action lies for a

(*n*) Post, Book III. To the important subject above briefly noticed, viz. the 'remoteness' of damage, I shall revert hereafter in treating generally of the measure of damages.

(*o*) 1 Com. 219.

public or common nuisance, but an indictment only; because, the damage being common to all the king's subjects, no one can assign his particular proportion of it, or, if he could, it would be extremely hard if every subject in the kingdom were allowed to harass the offender with separate actions." Where, however, an individual suffers from an indictable offence, as a nuisance, extraordinary damage—that is, damage over and above that which in common with the rest of the community he sustains, he will be entitled, in respect of such special and peculiar damage, to maintain an action (*p*).

Accordingly, Sir E. Coke observes (*q*), that there is a "diversitie" between the mode of procedure for disturbance of a private and a public way: in the former case, the law, he says, doth give unto the landowner, whose right or easement is disturbed, an action for recovery of damages; but if the way be a common way, and if any man be disturbed in going that way, or if a ditch be made across it so that he cannot go, yet he shall not have an action; and this the law has provided for *avoiding of multiplicity of suits;* for such common nuisance the apt remedy being by presentment before a grand jury in the proper Court.

In connection with the subject now before us, the case of *Wilkes* v. *The Hungerford Market Company* (*r*) should be consulted: there the plaintiff (a shopkeeper) brought his action for loss and damage sustained by him in his business by reason of an undue obstruction caused by the defendants in the public way and thoroughfare in which his shop was situated, by keeping up certain hoards used for building purposes for an unreasonable time. After verdict for the plaintiff, it was objected, in this case, that the grievance thus

(*p*) Id. 220. (*q*) 1 Inst. 56. a. (*r*) 2 Bing. N. C. 281.

complained of was a public injury, for which, indeed, an indictment might lie, but which was not the subject of an action. The Court, however, gave judgment in favour of the plaintiff, on the following grounds:—"For an injury which affects all his Majesty's subjects in common, the *only* mode of proceeding is by *indictment;* for any special injury which affects an individual beyond his fellows, he may obtain redress by *action;*" and, applying this principle, they remark, "The injury to the subjects in general is, that they cannot walk in the same track as before, and for that cause alone an action on the case would not lie; but the injury to the plaintiff is the loss of a trade, which, but for this obstruction to the general right of way, he would have enjoyed; and the law has said, from the Year-Books downwards, that, if a party has sustained any peculiar injury, beyond that which affects the public at large, an action will lie for redress. Is the injury in the present case of that character or not? The plaintiff, in addition to a right of way which he enjoyed in common with others, had a shop on the road side, the business of which was supported by those who passed—all who passed had the right of way, but all had not shops."

I have stated the above case at some length, because it well illustrates the distinction between *public* and *private* wrongs. The principle upon which the distinction in question is founded is certainly intelligible enough: the difficulty lies in its application, and cases might perhaps be put, in which it would not be easy to draw the line between a strictly private injury and a public nuisance (s).

In *Henley* v. *The Mayor of Lyme Regis* (t), which is in point for elucidating the present subject, the declaration set

(s) See *Simmons* v. *Lillystone*, 8 Exch. 431; *Rose* v. *Groves*, 5 M. & Gr. 613; *Iveson* v. *Moore*, 1 Ld. Raym. 486.

(t) 5 Bing. 91; *S. C.* 3 B. & Ad 77, 93; 2 C. & F. 331.

forth a charter casting an obligation upon the corporation (the defendants in the action) to do repairs, which were of general and public concern, to certain banks and sea-shore; the declaration also averred, that they had neglected to do such repairs; and that the plaintiff had, in consequence, sustained special damage. The Judges, in delivering their opinion to the House of Lords with reference to the sufficiency of the declaration in this case, laid it down as clear and undoubted law, that, wherever an indictment lies for non-repair, an action on the case will lie at the suit of a party sustaining any peculiar damage; and generally, that, where the Crown, for the benefit of the public, has made a grant imposing certain public duties, and that grant has been accepted, the public may enforce the performance of those duties by indictment, and individuals peculiarly injured by action.

The principle upon which the preceding case was decided was referred to and explained by the Court of Exchequer on a recent occasion (*u*) in these words: "There is no doubt of the truth of the general rule, that, where an indictment can be maintained against an individual or a corporation for something done to the general damage of the public, an action on the case can be maintained for a special damage thereby done to an individual, as in the ordinary case of a nuisance in the highway, by a stranger digging a trench across it, or by the default of the person bound to repair ratione tenuræ. Upon this ground, the corporation of Lyme Regis were held to be bound to compensate an individual for the loss sustained by non-repair of sea walls in a case which was decided by the Court of Common Pleas."

(*u*) *M'Kinnon* v. *Penson*, 8 Exch. 319 (recognising *Russell* v. *Men of Devon*, 2 T. R 667). See also *Sawyer* v. *Inhabs. of Northfield*, 7 Cushing (U.S.), R. 490; *Smith* v. *Wendell*, Id. 498.

I have already said, that the rule of law, which, in certain cases of a quasi criminal character, thus merges the right of action in the more apt and efficient mode of procedure by indictment, is referred by high authorities (*x*) to this reason, that multiplicity of suits should, wherever practicable, be avoided. I must add, however, that this reason, although true in the particular class of cases just alluded to, must not be pushed further than established precedents or express decisions will justify; for, as Lord *Holt* remarks in *Ashby* v. *White* (*y*), "If men will multiply injuries, actions must be multiplied too; for every man that is injured ought to have his recompense. Suppose the defendant had beat forty or fifty men, the damage done to each one is peculiar to himself; and he shall have his action. So, if many persons receive a private injury by a public nuisance, every man shall have his action (*z*). Indeed, where many men are offended by one particular act, there they must proceed by way of indictment and not of action, for in that case the law will not multiply actions. But it is otherwise when one man only is offended by that act, he shall have his action; as if a man dig a pit in a common, every commoner shall have his action on the case, *per quod communiam suam in tam amplo modo habere non potuit*, for every commoner has a separate right" (*a*).

Penal action by 'party aggrieved.'

Where an Act of Parliament imposes a penalty on any one violating its provisions, but enacts that no proceeding for recovery of such penalty shall be taken by any person other than 'a party grieved,' without the consent in writing of the Attorney-General, a plaintiff suing without such con-

(*x*) Ante, p. 97; 4 Bl. Com. 167.

(*y*) Ld. Raym. 938.

(*z*) Citing *Williams's case*, 5 Rep. 72; Co. Litt. 56. a.

(*a*) See also *Marys's case*, 5 Rep. 113 a; *Dobson* v. *Blackmore*, 9 Q. B. 991, 1002; Judgment *Pryce* v. *Belcher*, 3 C. B. 92.

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sent will be required to shew that his private interests have been affected by the act complained of, and that he has been 'aggrieved' thereby specially, and not merely as one of the public (*b*).

Merger of tort in felony.

Whilst upon this subject of the distinction between *public* and *private* wrongs, it is essential to notice another point immediately connected with it, viz. the *suspension of the civil remedy* where the act done is *felonious*. "The policy of the law," says Lord *Ellenborough*, C. J. (*c*), "requires, that, before the party injured by any felonious act can seek civil redress for it, the matter should be heard and disposed of before the proper criminal tribunal, in order that the justice of the country may be first satisfied in respect of the public offence;" for, as remarked by another learned Judge in the case just mentioned, it might very likely happen that criminal justice would be defeated if the injured party were first permitted to obtain a civil satisfaction for the injury. The rule in question, however, applies only where the act done amounts to felony; and even then it causes a postponement merely, and not a permanent merger or extinguishment, of the right of action, so that, if the wrong-doer be tried and acquitted of the felony, he may then be made civilly amenable for the wrong done: if, on the other hand, he be convicted of the felony and undergo his punishment, there seems to be no reason *theoretically*, though, on account of the operation of the law of forfeiture (*d*), there might be *practically*—why an action for damages should not be maintainable against

(*b*) *Boyce* v. *Higgins*, 23 L. J., C. P., 5.

(*c*) *Crosby* v. *Leng*, 12 East, 413.

(*d*) See *Bullock* v. *Dodds*, 2 B. & Ald. 258; *Bishop* v. *Curtis*, 21 L. J., Q. B., 391; 12 Rep. 121.

It should be observed, also, that, under the 7 & 8 Geo. 4, c. 29, s. 57, the restitution of stolen property may, after conviction of the thief, be ordered by the Court; and this remedy is cumulative and superadded to that by action, which exists at common law: *Scatterygood* v. *Sylvester*, 15 Q. B. 506.

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him at suit of the prosecutor. As authorities in support of this rule as to the suspension, or rather the postponement, of the right of action under the circumstances specified, I may refer to *Stone* v. *Marsh*(*e*); and to *White* v. *Spettigue*(*f*) which shews that the doctrine in question does not apply as between the party injured and a third person innocent of the felony.

Redress denied on grounds of public policy.

Besides cases like the preceding, where the private merges in the public wrong, others again present themselves in which considerations of general expediency or public policy forbid our Courts to interfere, or to compel compensation to a claimant for damage caused by the act of another. As illustrative of what is here meant I would refer to the case of *Johnstone* v. *Sutton*(*g*), which shews that an action will not lie against a commanding officer for anything done by him in the course of discharging his duty or incidental thereto. I would refer also to the case of *Buron* v. *Denman*(*h*), which seems to shew that the ratification by the Crown of a trespass ipso facto alters its character, and renders it no longer actionable. And I would direct attention to the occasional practical operation of that important doctrine of our constitution which declares that the sovereign can do no wrong(*i*).

Now, in cases falling within the scope of the principles

(*e*) 6 B. & C. 551, 564, and authorities cited Leg. Max., 2nd ed., 160. In any case falling within the class above adverted to, the same act constitutes in truth both a *public* and a *private* wrong; the *private wrong* is recognised, but the consideration of it is postponed, in order that the party injured may prosecute for the *public offence*: see per *Erle*, J., 11 Q. B. 895.

(*f*) 13 M. & W. 603.

(*g*) 1 T. R. 493, 510, 784. See also *Macbeath* v. *Haldimand*, 1 T. R. 172; *Gidley* v. *Ld. Palmerston*, 3 B. & B. 275.

(*h*) 2 Exch. 167, and cases there cited.

(*i*) Leg. Max., 2nd ed., pp. 40 et seq.; per Ld. *Lyndhurst*, C., *Viscount Canterbury* v. *Att. Gen.*, 1 Phill. 36.

here adverted to, grievous wrong may possibly be done, and damage may be caused to an individual, and yet no kind of remedy, or, at all events, no remedy by action may be open to him in a Court of law. Such cases consequently offer an exception to the rule which ordinarily prevails, viz. that damnum et injuria will constitute a ground of action.

Non-liability of judicial officers:

One important class of decisions, resting strictly on grounds of 'public policy,' demands attention in connection with what has been just said. I allude to those which affirm the doctrine of the non-liability of judicial officers for damage resulting from errors of judgment committed by them.

—of the superior Courts.

A little reflection might lead one to suppose that a discretionary power, so extensive as that confided by our constitution to the Judges of the superior Courts, must be accompanied with a corresponding degree of irresponsibility. If, therefore, the Judge in the exercise of his discretion commits an error, he will, as a general rule, be protected from penal or even from civil liability. The law, says Lord *Bacon* (*k*), has so much respect for the certainty of judgments and authority of Judges, that it will not permit any error to be assigned which impeaches them in their trust and office, and in wilful abuse of the same, but only in ignorance and mistaking either of the law or of the case and matter in fact.

The general principle of exemption from liability thus laid down is of great importance. It is necessary to the free and impartial administration of justice, that those who have been appointed to dispense it "should be uninfluenced by fear, and unbiassed by hope. Judges have not been invested with this privilege for their own protection merely;

(*k*) Max. 17; 12 Rep. 24.

it is calculated for the benefit of the people by insuring to them a calm, steady, and impartial administration of justice" (*l*).

So in *Garnett* v. *Ferrand* (*m*), it is laid down by Lord *Tenterden*, as a *general rule of very great antiquity* (*n*), "that *no action will lie against a Judge of Record* for any matter done by him in the exercise of his judicial functions." . . . "In the imperfection of human nature," says the same learned Judge, "it is better that an individual should occasionally suffer a wrong, than that the course of justice should be impeded and fettered by constant and perpetual restraints and apprehensions on the part of those who are to administer it. *Corruption* is quite another matter; so also are *neglect of duty and misconduct:* for these I trust there is, and always will be, some due course of punishment by *public prosecution.*"

But, although the general principle thus laid down may, at first sight, appear sufficiently clear and definite, difficulty will doubtless sometimes be felt in determining what acts can and what cannot properly be considered as judicial, so as to fall within it. The case of *Taaffe* v. *Downes* (*o*), however, shews, that, if it be once established that the particular act in question "emanated from and was appropriate to the *legal duties*" of the office of Judge of a Court of Record, such act may be viewed as *purely judicial*, and, therefore, within the rule. Nor will the test here suggested be applicable merely to acts done in open Court, it will ap-

(*l*) *Taaffe* v. *Downes*, 3 Moo. P. C. C. 36, n., cited per *Parke*, B., *Ryalls* v. *Reg.* 11 Q. B. 796.

(*m*) 6 B. & C. 611.

(*n*) See *Hammond* v. *Howell*, 1 Mod. 184; *S. C.*, 2 Mod. 218; *Bushell's case*, 1 Mod. 119.

(*o*) 3 Moo. P. C. C. 60, n.; *Brown* v. *Copley*, 8 Sc. N. R. 350; Judgment, *Mostyn* v. *Fabrigas*, Cowp. 161; Per Lord *Brougham*, *Ferguson* v. *Earl of Kinnoull*, 9 Cl. & F. 289—290. See also Broom's Pr. Vol. I. pp. 586—590.

ply also to such as are done at Chambers; equal privilege in either case attaching to the judicial office (*p*).

Where, however, the particular act complained of was done by the Judge when not acting judicially, or in respect of a matter not within his jurisdiction, the principle just stated does not apply. Thus, in *Calder* v. *Halket* (*q*), we find it broadly laid down, that "English Judges, when they act wholly without jurisdiction, whether they may suppose they had it or not, have no privilege." And the case of *Dicas* v. *Lord Brougham* (*r*), which was an action of trespass against the then Lord Chancellor for a committal for contempt under an order alleged to be illegal, will not be found to impugn the proposition just stated, because there the matter in question certainly fell within the general jurisdiction of the Judge.

Again, where an individual acts in a judicial capacity under an invalid appointment or commission, we have express authority for saying that the party so acting would not be privileged or exempted from civil liability.

In *Gahan* v. *Lafitte* (*s*), an action for trespass and false imprisonment was held to lie against individuals exercising the office of Judges, in one of our West India Islands, of a colonial court, under commissions from the governor of the island which were informal and void. And this case is, therefore, directly in point, as sustaining the proposition just stated.

The above remarks will amply suffice to shew, that the honesty and integrity of a Judge of one of our superior

(*p*) Per Lord *Norbury*, 3 Moo. P. C. C. 60, n.

(*q*) 3 Moo. P. C. C. 28; *Case of the Marshalsea*, 10 Rep. 68 b, cited Judgm., *Morrell* v. *Martin*, 3 M. & Gr. 595; *Houlden* v. *Smith*, 14 Q. B. 841. See *Levy* v. *Moylan*, 10 C. B. 189; *Beaurain* v. *Scott*, 3 Camp. 388.

(*r*) 6 Car. & P. 249.

(*s*) 3 Moore P. C. C. 382.

Courts, when acting in his judicial capacity, cannot be brought in question by action. Of course, if a mistake be committed by him in point of law, the case is altogether different, and then his decision may ordinarily be revised, either by the Court out of which the record issued, or by the Court of error.

Some of the cases latterly cited clearly establish that there are exceptions to the general rule, that *injuria sine damno is actionable.* And, by passing under review the ordinary defences available in actions founded either upon contract or in tort, further instances will readily present themselves, where for one reason or another our law interferes to protect parties from civil liability by action for wrong done, *ex. gr.* for breach of contract, on the ground of infancy or coverture,—or for personal injury caused by negligence, on the ground that the suffering party has, by the want of ordinary care, himself contributed to cause the damage complained of,—or, again, where the express words of a statute bar the remedy by action (*t*). I shall not, however, just now attempt to examine the additional cases here adverted to as being in their nature exceptional to the above rule, for such an inquiry, if properly pursued, would, in truth, be identical with a disquisition upon legal principles generally, whence alone the existence of legal rights can be deduced.

It may, however, in concluding this division of my subject, be well to call to mind, that, in the vast majority of cases which are brought into Courts of justice, both damnum and injuria combine (though sometimes, for specific reasons, ineffectually) in support of the claims put forth; the object

(*t*) See *Stevens* v. *Jeacocke*, 11 Q. B. 731; *Watkins* v. *The Great Northern R. Co.*, 16 Q. B. 961; *Couch* v. *Steel*, 23 L. J., Q. B., 121.

of a plaintiff usually (*u*) being to recover by his action,—if not liquidated or ascertained, at all events—*substantial* damages. The surest test, however, which can be applied to determine whether or not a *legal right* has in any given case been invaded, would seem to be this,—are or are not *nominal* damages recoverable at suit of the claimant? if they be, then, clearly, a right has been invaded, and an action will lie.

(*u*) That is, where the action is not brought for recovery of land or of some chattel *in specie*, or to vindicate a right, or in some other cases.

The reader will observe that the principles discussed in the foregoing chapter apply not merely to rights enforceable in the superior Courts, but to such also as are brought, by statute, within the cognisance of the County Court.

CHAPTER IV.

OF ORDINARY REMEDIES.

SECT. 1. *Of an Action at Law.*
2. *Of a Suit in the County Court.*

SECT. I. *Of an Action at Law.*

1. *Considerations preliminary to issuing the Writ.*

ASSUMING that an action will only lie for a legal wrong, for the invasion of a legal right, for the misfeasance or nonfeasance of a duty imposed by law (*a*), or for the recovery of some specific thing, it will probably be admitted that the existence of a remedy presupposes a right, and that right and duty are in truth correlative (*b*); so that, where a *right* has been invaded, there must have been a *duty* violated. Keeping these remarks in mind we may accept the definition of an action at law offered by Sir *E. Coke*, who tells us (*c*) that "*an action is the legal demand of a man's right.*"

The philosophical mode of presenting the above subject to the mind would seem to be by referring to the distinction often insisted upon between *perfect* and *imperfect* rights (*d*) and obligations, for the idea of a *perfect right* implies that he on whom it is conferred must have some suf-

(*a*) As to the right of action, if any, in this particular case, see further post, Bk. III.

(*b*) "Right always implies a correlative duty:" Richards. Dict. ad verb. "Right."

(*c*) Co. Litt. 285. a.

(*d*) It will be remembered that I am here speaking of *private* rights, i. e. rights enjoyed exclusively and enforceable by individuals.

ficient and adequate means of enforcing it. But a resort to violence and force cannot, with due regard to the interests of society, be intrusted to any one of its individual members who may think himself aggrieved; and this for a threefold reason—first, because the complainant himself cannot properly be allowed to decide as to the fact of a wrong having been done; 2ndly, because he might lack the power of compelling compensation for it; and 3rdly, because, if he possessed the power, he might exercise it in a manner detrimental to the interests and well-being of the community.

The State, therefore, assumes to itself the task of deciding as to the fact whether or not a wrong has been done, and of judging as to the nature of the right alleged to have been invaded; and further, when necessary, it likewise assumes the privilege of vindicating the party aggrieved against the aggressor. Now, all this is effected in very many cases through the medium of an action at law, whereby an individual member of the community puts in motion the machinery provided by the state for the purpose of obtaining a formal recognition of the justice of his claim, and then of compelling its enforcement against his adversary. In the conception, therefore, of an action at law, the *actor* or plaintiff, the *reus* or defendant, and the *judex* or judge, will be found to be essential elements.

Before, however, an individual, conceiving that he is aggrieved, can safely resort to the remedy by action, he should satisfy himself in regard to several preliminary matters; he should inquire whether a complete cause of action is vested in him; whether or not the right of action has been postponed or extinguished, or has become barred by the Statute of Limitations; he should consider whether or not any notice of action is requisite, and, if so, to whom and when it must be given. Further it will, most probably, be found advisable, before issuing the writ, to determine as to the

form of action which may be proper; and lastly, it will be necessary to select the parties by and against whom respectively it should be brought.

With reference to each of the above heads of inquiry, it is my intention to say a few words, lest, in confining myself strictly to an examination of the necessary steps and stages in an action, these preliminary matters, which are of at least as vital concern to a suitor, should be overlooked or forgotten by the reader.

1. In the first place, then, the party proposing to sue should satisfy himself that he has a *complete cause of action* against the defendant; for, at the trial, he will have to shew that a right of action existed and was vested in him before he commenced his suit (*e*), i. e. before he issued his writ, the date of the writ being, as will hereafter appear, that of the commencement of the action. Sometimes, on instituting the inquiry here suggested, it will be found that the supposed contract relied upon as the ground of action was, in fact, never fully assented to by the opposite party, or that its terms were not defined with sufficient precision to render it binding (*f*), or that a right of action was intended to accrue solely upon the happening of some event which has not yet occurred (*g*), or upon the performance, by the contractee, of some condition precedent which he has failed altogether to perform (*h*).

(*e*) *Castrique* v. *Bernabo*, 6 Q. B. 498, affords a good illustration of this rule.

(*f*) *Cope* v. *Albinson*, 8 Exch. 185; *Duncan* v. *Topham*, 8 C. B. 225; *Lewis* v. *Nicholson*, 21 L. J., Q. B., 311; *Cheveley* v. *Fuller*, 13 C. B. 122; *Dunlop* v. *Higgins*, 1 Ho. L. Cas. 381.

(*g*) *Alder* v. *Boyle*, 4 C. B. 635.

(*h*) *Mason* v. *Harvey*, 8 Exch. 819; *Grafton* v. *Eastern Counties R. Co.*, Id. 699; *Kingdom* v. *Cox*, 5 C. B. 522; *Jowett* v. *Spencer*, 1 Exch. 647; *Judson* v. *Bowden*, Id. 162; *Dicker* v. *Jackson*, 6 C. B. 103; *Porcher* v. *Gardner*, 8 C. B. 461; *Pordage* v. *Cole*, 1 Wms. Saunds. 320 a, (4); *Nowell* v. *Mayor &c. of Worcester*, 9 Exch. 457; *Jones* v. *Cannock*, 3 H. L. Ca. 700.

It cannot, however, be laid down as a universal rule, that where, by agreement, an act is to be done on a future day, no action can be brought for a breach of the agreement till the day for doing the act in question has arrived. "If," says Lord *Campbell*, C. J. (*i*), "a man promises to marry a woman on a future day, and before that day marries another woman, he is instantly liable to an action for breach of promise of marriage (*j*). If a man contracts to execute a lease on and from a certain day for a certain term, and before that day executes a lease to another for the same term, he may be immediately sued for breaking the contract (*k*). So, if a man contracts to sell and deliver specific goods on a future day, and before the day he sells and delivers them to another, he is immediately liable to an action at the suit of the person with whom he first contracted to sell and deliver them (*l*)." In cases of this kind, it seems that, by the contract to do an act on a future day a relation is constituted between the parties, which raises an implied promise, that, in the meantime, neither will do anything to the prejudice of the other inconsistent with that relation; and upon a breach of this implied promise an action will lie without waiting for the expiration of the time specified in the original contract (*m*).

The 17th section of the Statute of Frauds (*n*) will be found to offer a strong illustration of the rule, that no action should be commenced until the cause of action is com-

(*i*) *Hochster* v. *De La Tour*, 2 E. & B. 678.

(*j*) *Short* v. *Stone*, 8 Q. B. 358. See *Caines* v. *Smith*, 15 M. & W. 189.

(*k*) *Ford* v. *Tiley*, 6 B. & C. 325; *Lovelock* v. *Franklyn*, 8 Q. B. 371.

(*l*) *Bowdell* v. *Parsons*, 10 East, 359.

(*m*) Judgment, *Hochster* v. *De La Tour*, 2 E. & B. 689, 694. See *Lewis* v. *Clifton*, 23 L. J., C. P., 68.

(*n*) Post, Book II.

plete; for although that section only requires some memorandum in writing of a contract, not that the entire contract itself should be in writing; nevertheless, a memorandum signed *after action brought* would not satisfy the statute (*o*).

2. The party purposing to sue will do well to consider whether or not the right of action has been postponed by the act of the parties or has been altogether extinguished. This right may be postponed, as by credit being given for a specified period (*p*), or by the receipt of a bill of exchange or promissory note payable at some future day, "for and on account of" the cause of action (*q*). The right in question may be altogether extinguished, as by merger (*r*), by payment, or by a release; and if once extinguished, for ever so short a time, it cannot again revive (*s*).

Sometimes a plaintiff, in order to avoid incurring useless expense and disappointment, will be well advised to examine the Statute of Limitations applicable to his case, with a view to ascertaining whether his remedy is barred by its provisions, or, at all events, with a view to preventing its operation.

3. Where the proposed action is to be brought under the provisions of an Act of Parliament, care must of course be taken that the requisitions (if any) of the particular Act having reference to matters preliminary to the issuing of

(*o*) Argument, *Mitcheson* v. *Nicol*, 7 Exch. 935; *Bill* v. *Bament*, 9 M. & W. 36.

(*p*) See per *Patteson*, J., *Lamb* v. *Pegg*, 1 Dowl. 447.

(*q*) *Kearslake* v. *Morgan*, 5 T. R. 513; per *Pollock*, C. B., *Griffiths* v. *Owen*, 13 M. & W. 64; *James* v. *Williams*, Id. 828; Byles on Bills, 6th ed., 303; and cases cited *Gibbons* v. *Vouillon*, 8 C. B. 483.

(*r*) Post, Book II.

(*s*) *Ford* v. *Beech*, 11 Q. B. 852, 867; *Gibbons* v. *Vouillon*, 8 C. B. 483; *Belshaw* v. *Bush*, 11 C. B. 191; *Webb* v. *Spicer*, 13 Q. B. 886.

the writ be complied with. In some cases, for instance, the consent of a Judge (*t*), or of the Attorney-General (*u*), may be indispensable before commencing the action.

4. Another important point for consideration will be, whether or not any kind of *notice* be necessary before suing.

It is indeed true, that, wherever the enforcement of a right of action is contemplated, some reasonable notice of the intended proceeding (even when not in strictness requisite), or some demand for pecuniary compensation, or some request for the performance of that which has been wrongfully left undone, should be made upon the opposite party, in order that a fair opportunity for an amicable settlement may thus be afforded him. And hence it is, that a respectable attorney will always make a demand of some sort on behalf of his client before complying with his instructions as to issuing the writ. Cases do, moreover, present themselves, in which proof of a demand and refusal may, on other grounds, be highly expedient, or may even be indispensable to a successful issue, ex. gr. in trover, where it may, in the absence of other proof, be needed as evidence of a conversion, or in an action for slander, which it is usually considered unsafe to bring without previously inquiring whether the adverse party means to abide by the slanderous imputation complained of or will retract it (*x*), or in a case falling within the 213th section of the Common Law Procedure Act, 1852, where a tenant holds over after the expiration of his term (*y*).

(*t*) *Grant* v. *Brown*, 1 D. & L. 799.

(*u*) See, for instance, 7 & 8 Vict. c. 110, s. 77; *Boyce* v. *Higgins*, 14 C. B. 1.

(*x*) Per Lord *Denman*, C. J., *Griffiths* v. *Lewis*, 7 Q. B. 66.

(*y*) See also *Davis* v. *Burrell*, 10 C. B. 821.

But, besides cases like those just alluded to, there are numerous statutes, under which formal notice is absolutely essential before commencing an action (*z*). Thus, under the 11 & 12 Vict. c. 44, intituled "An Act to protect Justices of the Peace from vexatious Actions for Acts done by them in Execution of their Office," it is enacted (sect. 9), that no action shall be commenced against a justice of the peace, for anything done by him in the execution of his office, until one calendar month, at least, after a notice in writing of such intended action shall have been delivered to him, or left for him at his usual place of abode (*a*). So, under the 24 Geo. 2, c. 44, s. 6, no action shall be brought against any constable or other officer for "anything done in obedience to any warrant under the hand or seal of any justice of the peace," until a demand of the perusal and copy thereof has been made, and refused or neglected for the space of six days after such demand. Again, under the 138th section of the County Courts Act (9 & 10 Vict. c. 95) it is enacted, "for the protection of persons *acting in the execution of*" the statute, that *notice in writing* of any action to be brought against any person for anything done *in pursuance of* the Act, shall be given to the defendant *one calendar month*, at least, before the commencement of the action.

Where protection of this kind is given by the statute law, much difficulty often occurs in determining whether the defendant has so acted as to have brought himself

(*z*) See *Kent* v. *Great Western R. Co.*, 3 C. B. 714, *Carpue* v. *London and Brighton R. C.*, 5 Q. B. 747.

(*a*) See the cases collected, Broom's Prac., vol. 1, pp. 603-5; and *Haylock* v. *Sparke*, 1 E. & B. 471; *Davies* v. *Mayor of Swansea*, 8 Exch. 808; *Edwards* v. *Lowndes*, 1 E. & B. 81; *Edwards* v. *Great Western R. C.*, 11 C. B. 588; *Read* v. *Coker*, 13 C. B. 850.

within the words and meaning of the particular clause, which requires that notice of action should be given.

In *Hughes* v. *Buckland* (*b*), the question, what might be held to have been done "in the execution" and "in pursuance" of a statute was much discussed, and many authorities bearing upon the subject were cited. The statute on which this case arose was the 7 & 8 Geo. 4, c. 29, which authorises the summary apprehension by the servants of the owner of a fishery of any persons found fishing there in contravention of its provisions. The plaintiff had been so apprehended by the defendants (servants of the owner), who, the jury found, *bonâ fide* and *reasonably believed* that the fishery in question extended over the spot where the plaintiff was apprehended, whereas in fact it terminated some few yards short of that spot. The defendants were, however, held to be entitled to the protection of the Act. From this and similar cases we deduce as a safe proposition, that notice of action, or any other condition imposed on plaintiffs by any statute such as we have just adverted to, may be insisted on by those persons who have acted bonâ fide in pursuance of it, and who reasonably believed themselves to have been filling the character specified in it, as entitled to claim its protection. This was the test deemed applicable in *Booth* v. *Clive* (*c*), which was an action against a County Court Judge, for making an order for the committal of the plaintiff to gaol after a prohibition had issued to prevent further proceedings in the suit, which had been commenced

(*b*) 15 M. & W. 346.

(*c*) 10 C. B. 827. See also *Arnold* v. *Hamel*, 9 Exch. 404; *Lawson* v. *Dumlin*, 9 C. B. 54; *Howard* v. *Remer*, 2 E. & B. 915; *Kirby* v. *Simpson*, 10 Exch. 358; *Taylor* v. *Nesfield*, 3 E. & B. 725; *Tarrant* v. *Baker*, 14 C. B. 149; *White* v. *Morris*, 11 C. B. 1015; *Thomas* v. *Stephenson*, 2 E. & B. 108; *Joule* v. *Taylor*, 7 Exch. 58; *Stamp* v. *Sweetland*, 8 Q. B. 18, n. (*h*).

in the County Court. The question which the Court here proposed for its determination was, did the defendant try the cause, honestly believing that his duty as judge under the County Court Act called upon him to do so (*d*)?

Forms of action.

5. Assuming that proper notice, when it is requisite, has been given, the next step which (prior to the Common Law Procedure Act, 1852) (*e*) it was incumbent upon the plaintiff to take, was to determine the *form of action* (*f*) adapted to his case, in order that he might issue his writ in the proper shape; but it is now by the 3rd section of that statute rendered no longer necessary to mention any form of action in any writ of summons; and the alterations also effected thereby (*g*) in the technicalities of pleading, have removed much of the practical value and significance which belonged to the distinctive characteristics of *forms of action* established under the earlier practice.

It is therefore no longer necessary in any case, before issuing the writ, or framing the declaration, to determine on the specific form of action to be adopted; but it is still essential to study the forms of action, to some extent at least, for it must be remembered that questions relating to them occupy considerable space in our reports and learned text books, and that to these sources the lawyer must constantly refer for principles. The meaning of the terms heretofore employed by legal writers should of course be familiar

(*d*) See also *Huggins* v. *Waydey*, 15 M. & W. 357; *Braham* v. *Watkins*, 16 M. & W. 77; *Gosden* v. *Elphick*, 4 Exch. 445. See also the 5 & 6 Vict. c. 97, s. 4, by which an uniform time of one calendar month has been introduced for notices of action required by the *statutes then in force.*

(*e*) 15 & 16 Vict. c. 76.

(*f*) A "form of action" may be defined as "the peculiar technical mode of framing the writ and pleadings appropriate to the particular injury which the action is intended to redress;" C. L. Com., 1st Rep. p. 32.

(*g*) See ss. 49—51.

to him; and not only so, but inasmuch as forms represent—more or less accurately—substance, those principles themselves will often be found discussed and settled, under the semblance of arguments and judgments ostensibly directed to questions of form. Indeed, I may at once say, that no accurate or liberal knowledge of law can be attained by any one who has not first mastered this branch of the science, as it formerly existed.

That too much stress was wont to be laid upon matters of form (*h*) may be perfectly true, and the classification of actions in a purely scientific point of view must be admitted to have been both imperfect, and, at different periods in the history of the law, varying and vexatious. Some recognised though conventional mode of indicating specific causes of action, by reference to a known classification, is however obviously desirable.

Actions have, from remote times, been divided into three classes, *Real, Personal,* and *Mixed.* The distinction, always cherished by the policy of our law, between rights appertaining to real and those connected with personal property, explains to some extent this classification, so far, at least, as the first two of these classes are concerned, the third class having been invented to include those causes of action which partake in some sort of the nature of both the former. Each of these three classes admits of subdivision into certain species or forms of action.—The forms of real and mixed actions, as anciently subdivided, were very numerous, and involved much useless technicality and practical difficulty. The stat. 3 & 4 Will. 4, c. 27, however, abolished

(*h*) See per Lord *Kenyon,* C. J., *Savignac* v. *Rhome,* 6 T. R. 129; *Israel* v. *Douglas,* 1 H. Bl. 243; *Turner* v. *Hawkins,* 1 B. & P. 476. Per *Abbott,* C. J., *Orton* v. *Butler,* 5 B. & Ald. 654.

all of these forms save four, viz. writ of right of dower, dower unde nihil habet, quare impedit, and ejectment (*i*).

We may, then, take personal actions to include those which are brought for the specific recovery of goods and chattels, or for damages for breach of contract, or wrongs done to the person or property, the simplest division of which is into, 1st, actions ex contractu, and 2ndly, actions ex delicto. When the cause of action springs directly out of or is founded upon contract, the action will fall within the former of these classes, and will be described as originating ex contractu; when the cause of action is founded upon a wrong independent of contract, it will fall within the latter of the above classes, and the action will be said to originate ex delicto.

Actions ex contractu.

Actions ex contractu are divisible into assumpsit, debt, detinue, covenant, account, and annuity.

Assumpsit.

An action of *Assumpsit* is founded upon a promise, express or implied, or upon a contract or agreement not under seal. In *Slade's case* (*k*) will be found much learning upon the supposed nature of this action. Previously thereto, assumpsit was held to be included under the more general head of actions on the case, and was held to be founded on the *non-feasance* of a duty in respect of which special damages (*l*) were demanded by the plaintiff. This doctrine, however, was in *Slade's case* relaxed; and it was afterwards considered settled that a claim for a debt due upon simple

(*i*) The reader, if curious to investigate the abolished forms (which are enumerated in the 36th section of the 3 & 4 Will. 4, c. 27) may refer to Co. Litt. 239, n. 1; 1 Bl. Com. c. 10; Bac. Abr. "Action in General" (A.); and Steph. Pl., 5th edit., pp. 9 et seq. The action of ejectment will be partially considered hereafter: Bk. III. Chap. 3, s. 1.

(*k*) 4 Rep. 91 a, 92 b.

(*l*) See per Lord *Loughborough*, C. J., *Rudder* v. *Price*, 1 H. Bl. 551.

contract would lie equally well in assumpsit as in debt; and, since the decision just cited, assumpsit has substantially been treated as an action of contract rather than of tort.

By the third resolution in *Slade's case*, it was further determined "that every contract *executory* imports in itself an assumpsit; for when one agrees to pay money, or to deliver anything, he thereby assumes or promises to pay or deliver it; and therefore when one sells any goods to another, and agrees to deliver them at a day to come, and the other in consideration thereof agrees to pay so much money at such a day, in that case both parties may have an action of debt, or an action *on the case on assumpsit*" (*m*).

We may conclude, then, with a learned writer, that, prior to the Common Law Procedure Act, 1852, "the breach of all simple contracts, whether verbal or written, express or implied, for the payment of money, or for the performance or omission of any other act," was remediable by action of assumpsit (*n*), and thus assumpsit became the form of remedy most resorted to in the superior Courts. By force, however, of certain provisions contained in the statute just specified, all causes of action remediable under the common indebitatus counts are now referable to debt,—not to assumpsit (*o*).

Debt.

Debt is the appropriate remedy where a specific and determinate sum of money is claimed. It "lies to recover a sum certain or capable of being reduced to certainty by calculation, payable in respect of a direct and immediate liability by a

(*m*) As to executory contracts not under seal, see further, post, p. 308.

(*n*) Chitt. Pl., 7th edit., vol. 1, pp. 111—122.

(*o*) Compare the 49th section of the C. L. Proc. Act, 1852, with the forms of declaration contained in Sched. B., Nos. 1—14, and with the form of the plea of nunquam indebitatus (No. 36). See *Yates* v. *Eastwood*, 6 Exch. 805; *Corbett* v. *Packington*, 6 B. & C. 268.

debtor to a creditor" (*p*). Debt is therefore not adapted to claims sounding in damages. It is a more extensive remedy in some respects than assumpsit; for, in addition to being an appropriate remedy for the enforcing of many claims founded on simple contract, it may lie for the recovery of money due on specialty (*q*) or record (*r*), and it is also available for the recovery of a penalty imposed by statute (*s*).

Formerly, when technical distinctions were deemed important, it was laid down that a plaintiff in an action of debt was limited to a recovery of the precise sum which he claimed as due to him; whilst, in indebitatus assumpsit, he might have recovered an amount smaller than that alleged to be due (*t*). This view, however, of the difference between the two actions in question has been modified; and now, where the plaintiff recovers a sum of money, the amount to which he is entitled may be awarded to him by the judgment *generally*, without specifying whether it is recovered as a debt or as damages (*u*).

Another distinction also between debt and assumpsit subsisted under the former practice. In assumpsit, inasmuch as damages only were demanded, judgment by default

(*p*) C. L. Com., 1st Rep., p. 31. See *Bracegirdle* v. *Hinks*, 9 Exch. 361; *Bogg* v. *Pearse*, 10 C. B. 534; *Stone* v. *Rogers*, 2 M. & W. 443; *Sunderland Marine Ins. Co.* v. *Kearney*, 16 Q. B. 925; *Smith* v. *Winter*, 12 C. B. 487; *Bonaker* v. *Evans*, 16 Q. B. 162.

(*q*) Chitt. Pl., 7th edit., vol. 1, p. 123. As to contracts by specialty, and their distinguishing characteristics, see post, p. 276.

(*r*) Chitt. Pl., 7th edit., vol. 1, p. 124. See *Frith* v. *Wollaston*, 7 Exch. 194; *Henderson* v. *Henderson*, 6 Q. B. 288; *Russell* v. *Smyth*, 9 M. & W. 810; *Henley* v. *Soper*, 8 B. & C. 16.

(*s*) See 4 Geo. 2, c. 28; 3 & 4 Will 4, c. 42, s. 14; *Addison* v. *The Mayor of Preston*, 12 C. B. 108, 133; *Tobacco Pipe Makers Co.* v. *Loder*, 16 Q. B. 775.

(*t*) *Hooper* v. *Shepherd*, 2 Str. 1089 (where, indeed, it was thought arguable, that covenant only, and not debt, would lie on a deed of charter-party). See also *Aylett* v. *Lowe*, 2 W. Bl. 1221.

(*u*) Com. L. Proc. Act, 1852, s. 95; post, p. 633.

was interlocutory, and the actual amount for which such judgment was to be entered up had to be ascertained either by a jury on a writ of inquiry, or, in the case of a liquidated demand, by a reference to one of the Masters of the Court. But when judgment went by default in an action of debt, it was, with some few exceptions, final, and execution issued for the whole amount mentioned in the declaration, which was usually a much larger sum than was really due,—the sheriff, by a memorandum on the writ of execution, being however directed to levy such last-mentioned sum only (*x*). And now, by the Common Law Procedure Act, 1852, ss. 92-95, rules to compute (*y*) are abolished, *all* judgments by default for debts or liquidated demands in money are final, and when the amount of damages appears to be substantially a matter of calculation, and not one where the intervention of a jury is requisite, it may, by order of the Court or Judge, be referred for determination to a Master (*z*).

Detinue.

The action of *Detinue* is, as the term indicates, framed with a view to the recovery of personal chattels unjustly detained (*a*). It was, even before the Common Law Procedure Act, 1852, often associated with a claim of debt, or, as it was called, was in the *debet* and *detinet*. The judgment in detinue was in the alternative, that the plaintiff should

(*x*) C. L. Com., 1st Rep., p. 41.

(*y*) As to the old rule to compute, see Chitt. Prac., 8th edit., vol. 2, p. 910.

(*z*) See Reg. Gen. H. T., 1853, reg. 171-2.

(*a*) Doubt has been entertained, whether detinue should be ranked with actions ex contractu, or with those ex delicto. See Selw. N. P., 10th edit., "Detinue." *Bishop* v. *Visc. Montague*, Cro. Eliz. 824; Per *Tindal*, C. J., *Walker* v. *Needham*, 3 M. & Gr. 561.

For a form of declaration in detinue, since the C. L. Proc. Act, 1852, see *Chilton* v. *Carrington*, 15 C. B. 95. And as to the effect of the plea of non detinet, see the new Pleading Rules, H. T., 1853, reg. 15.

Detinue lies against him who once had, but has improperly parted with, the possession of chattels: Com. Dig. "Detinue" (A.); *Jones* v. *Dowle*, 9 M. & W. 19.

recover the goods, *or* the value thereof, (which it was the province of the jury severally to assess, if he could not have the goods themselves,) and his damages for the detention, and his costs of suit,—thus giving the option to the defendant, who certainly had no right to such a privilege, of either giving up the goods, or paying their value (*b*). The 78th sect. (*c*) of the Common Law Procedure Act, 1854, has remedied this state of the law, by enacting, that, whenever money is deemed by the plaintiff an inadequate compensation for the loss to him of the chattel in respect of which he is suing, he may apply to the Court to order (*d*) that "execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining such chattel upon paying the value assessed; and that, if the said chattel cannot be found, and unless the Court or a Judge should otherwise order, the sheriff shall distrain the defendant by all his lands and chattels in the said sheriff's bailiwick, till the defendant render such chattel, or, at the option of the plaintiff, that he cause to be made of the defendant's goods the assessed value of such chattel" (*e*).

(*b*) *Phillips* v. *Jones*, 12 Q. B. 867; *S. C.* (in Error) 15 Q. B. 859.

(*c*) As to which, see *Chilton* v. *Carrington*, 15 C. B. 730.

(*d*) Prior to the C. L. Proc. Act, 1854, a plaintiff had often to resort to a Court of equity to enforce the return of a chattel detained from him: See Story's Eq. Jur. 4th edit., vol. 2, s. 709.

(*e*) When the re-delivery of the chattel had become impossible,—as when charters or deeds were burnt, —or when they had been already re-delivered before trial, it was competent to the jury, in this form of action, to find specially the facts, and confine themselves to an assessment of damages: see *Williams* v. *Archer*, 5 C. B. 318.

As throwing further light upon the nature of the action of detinue, see *Turner* v. *Trustees of Liverpool Docks*, 6 Exch. 543; *Crossfield* v. *Such*, 8 Exch. 825; *S. C.* Id. 159; *Morgan* v. *Marquis*, 9 Exch. 145; *Foster* v. *Crabb*, 12 C. B. 136; *Clossman* v. *White*, 7 C. B. 43; *Atwood* v. *Ernest*, 13 C. B. 881.

The county courts have jurisdiction in actions of detinue: *Taylor* v. *Addyman*, 13 C. B. 309.

Account is a form of action which lies against a bailiff or receiver, for money which has come into his hands, and for which he is bound to account. This action was found inconvenient in practice, and, rather than adopt it, plaintiffs resorted for the most part to equity. "The use of an action of account," says *Gibbs*, C. J., in *Tomkins* v. *Willshear* (*f*), "is where the plaintiff wants an account, and cannot give evidence of his right without it." The disadvantages of the action in question were found to be, that the parties to it could not be examined on oath, and that the machinery of the common law Courts was not suitable to the consideration and adjustment of complicated accounts—a disadvantage, however, which was also experienced when actions were brought in assumpsit, and which was generally met at the trial, after serious expenses had been incurred, by a reference to arbitration (*g*). It remains to be seen whether the provisions of the Common Law Procedure Act, 1854, facilitating references to arbitration, will have the effect intended (*h*), namely, that of settling disputed accounts in common law Courts without the intervention of a jury. By the 3rd section of this statute, if it be made to appear, "at any time after the issuing of the writ, to the satisfaction of the Court or a Judge, upon the application of either party, that the matter in dispute consists wholly or in part of *matters of mere account*, which cannot conveniently be tried in the ordinary way, it shall be lawful for such Court or Judge upon such application, if they or he think fit, to decide such matter in a summary manner, or to order that such matter, either wholly or in part, be referred to an arbitrator ap-

Account.

(*f*) 5 Taunt. 431.

(*g*) Id.; Per *Gibbs*, C. J., *Arnold* v. *Webb*, 5 Taunt. 432, n. (*a*).

(*h*) See C. L. Com., 2nd Rep., pp. 5, 6; and see Francis's C. L. Proc., p. 270.

pointed by the parties, or to an officer of the Court, or, in country causes, to the Judge of any county court, upon such terms, as to costs and otherwise, as such Court or Judge shall think reasonable; and the decision or order of such Court or Judge, or the award or certificate of such referee, shall be enforceable by the same process as the finding of a jury upon the matter referred."

Some recent cases, where the action of account has been employed, and where the older authorities bearing upon it are discussed, are below cited (*i*).

Covenant. *Covenant* lies (often concurrently with debt) for the recovery of damages for the breach of a covenant or contract *under seal.* The main points for consideration accordingly, in reference to this action, will be, what amounts to a covenant?—what constitutes a breach?

The nature of a covenant is hereafter sufficiently investigated (*k*): it is a contract under seal, whereby a party enters into an obligation either to do or to abstain from doing an act, or pledges himself to the truth of certain facts.

A breach of covenant occurs wherever he who has entered into such a contract fails to carry it out according to the legal meaning and effect of the words which he has used (*l*).

Annuity. The action of *Annuity* will be found referred to—though very rarely, in the old Reports; it was invented for the recovery of money payable by way of annuity, but has long been obsolete (*m*).

(*i*) *Eason* v. *Henderson*, 12 Q. B. 986; *Beer* v. *Beer*, 12 C. B. 76; *Sturton* v. *Richardson*, 13 M. & W. 17. See also *Wheeler* v. *Horne*, Willes, 208; Reeves' Hist. Eng. Law, vol. 2, p. 338.

(*k*) Post, p. 277.

(*l*) In regard to the action of covenant generally, and for information respecting breaches of ordinary covenants, the reader is referred to Selw. N. P., vol. 1, tit. "Covenant."

(*m*) For some information respecting the action of annuity, see Com. Dig.: "Annuity" and "Dett."

Passing on to the second division of personal actions, namely, those which arise *ex delicto*, or are founded on tort, I may remark, that they are four in number, viz. trespass, case, trover, and replevin. Actions ex delicto

Trespass has always been esteemed as the proper form of action for a *direct* injury to person or to property—*i. e.* for an injury caused by immediate violence or force—actual or implied: *actual*, as in the case of an assault; *implied*, as in the case of a wrongful, though peaceful, entry on land (*n*). Trespass.

Numerous cases illustrating the nature of this action under circumstances of ordinary occurrence are collected in the Third Book (*o*) of these Commentaries, to which the reader, seeking full information in regard to it, is referred.

The origin of the action on the *Case* has been already indicated (*p*). Case lies to recover damages for torts to the person or property not committed wilfully or with immediate force, actual or implied. Case.

Case, remark the Common Law Commissioners in their 1st Report (*q*), is a remedy far more extensive than any other available by action; it lies for what are called *consequential* injuries—that is, injuries supposed to arise indirectly and consequentially from the act complained of,—as from slander, whereby the complainant's character is injured;—or from negligent driving, whereby the plaintiff is run over and hurt, and the like. A familiar illustration of the difference between trespass, which lies for a direct, and

(*n*) The leading authority illustrating the nature of the action of trespass, and shewing the distinction between trespass and case, is *Scott* v. *Shepherd*, cited ante, p. 95.

(*o*) Of which, see particularly Chaps. 2 and 3.

(*p*) Ante, pp. 39, 40.

(*q*) P. 31.

case, which lies for a consequential, injury, may be thus stated: Suppose a person throws a log of wood on a highway, and by the act of throwing another person is injured, the remedy under such circumstances is trespass. But if the log reaches the ground, and remains there, and a person falls over it and is injured, the remedy is case, as the injury is not immediately consequent on the act done (*r*). So, if the defendant drive his carriage against that of another, the remedy may be trespass; but if the defendant's servant be driving, the remedy is case (*s*). Many dissimilar states of facts giving rise to the form of remedy now adverted to will be minutely specified hereafter (*t*).

Although, formerly, it was deemed so essential strictly to preserve "the boundaries of actions" (*u*), yet case was often held to lie equally with trespass in respect of the same facts (*x*).

Trover.

Trover is one of the varieties of case. It was originally brought for recovery of damages (*y*) against one who had

(*r*) See, per *Fortescue*, J., *Reynolds* v. *Clarke*, 1 Str. 635.

(*s*) C. L. Com., 1st Rep., p. 31.

(*t*) Post, Book III, of which see particularly Chaps. 1 and 4.

See, also, as showing under what circumstances case will lie, *Yates* v. *Eastwood*, 6 Exch. 805; *Woods* v. *Finnis*, 7 Exch. 363, 372; *Collett* v. *London and North Western R. C.*, 16 Q. B. 984; *Muskett* v. *Hill*, 5 Bing. N. C. 694; *Marker* v. *Kenrick*, 13 C. B. 188; *Kinlyside* v. *Thornton*, 2 W. Bla. 1114.

(*u*) Per *Raymond*, C. J., *Reynolds* v. *Clarke*, 1 Str. 635; ante, p. 117, n. (*h*).

(*x*) See Com. Dig. "Pleader," Action on the Case (A.); *Leame* v. *Bray*, 3 East, 593; *Covell* v. *Laming*, 1 Camp. 697; *Chandler* v. *Broughton*, 1 C. & M. 29; *Hartley* v. *Moxham*, 3 Q. B. 701; *West* v. *Nibbs*, 4 C. B. 172; *Clegg* v. *Dearden*, 12 Q. B. 576; Per *Parke*, B., *Gordon* v. *Roll*, 4 Exch. 366; *Sharrod* v. *London and North Western R. C.*, 4 Exch. 580; *Ash* v. *Dounay*, 8 Exch. 237; *Moreton* v. *Hardern*, 4 B. & C. 224; *Williams* v. *Holland*, 10 Bing. 112, where the prior cases are collected.

(*y*) See *Read* v. *Fairbanks*, 13 C. B. 692.

found goods and refused to deliver them on demand (*z*) to the rightful owner (*a*), but *converted* (*b*) them to his own use; and from this fiction of a loss and *finding* of the goods (all trace of which is lost under the now existing procedure (*c*)), the remedy derived its name. Lord *Mansfield*, C. J., described this action (*d*) as being in *form* a fiction, in *substance* a remedy to recover the value of personal chattels wrongfully converted by another to his own use. "The form supposes the defendant may have come lawfully by the possession of the goods. This action lies and has been brought in many cases where in truth the defendant has got the possession lawfully. . . . This is an action of tort, and the whole tort consists in the wrongful conversion. Two things are necessary to be proved to entitle the plaintiff to recover in this kind of action: 1st. property in the plaintiff; and 2ndly, a wrongful conversion by the defendant."

This form of action, then, is adapted to try the title (*e*) to personalty—though not to chattels annexed to the freehold (*f*); it is in some respects analogous to trespass *de bonis asportatis, i. e.* for goods taken and carried away; the latter, however, is founded on possession actual or constructive, whilst trover is founded on a right of property

(*z*) *Heald* v. *Carey*, 11 C B. 977; *Rooke* v. *Midland Counties R. C.*, 16 Jur. 1069.

(*a*) *Bridges* v. *Hawkesworth*, 21 L. J., Q. B., 75; *Scattergood* v. *Sylvester*, 15 Q. B. 506.

(*b*) As to what constitutes conversion, see cases supra, n. (*z*); *Giles* v. *Taff Vale R. C.*, 2 E. & B. 822; *Simmons* v. *Lillywhite*, 8 Exch. 431; *Glover* v. *London and North Western R. C.*, 5 Exch. 60; *Powell* v. *Hoyland*, 6 Exch. 67; *Mayhew* v. *Herrick*, 7 C. B. 229. See also *Buckland* v. *Johnson*, 15 C. B. 145; *Towne* v. *Lewis*, 7 C. B. 608.

(*c*) C. L. Proc. Act, 1852, s. 49.

(*d*) *Cooper* v. *Chitty*, 1 Burr. 31.

(*e*) *Waller* v. *Drakeford*, 1 E. & B. 749; *Manders* v. *Williams*, 4 Exch. 339.

(*f*) *Roffey* v. *Henderson*, 17 Q. B. 574; *Davis* v. *Jones*, 2 B. & Ald. 165. See 2 Wms. Saund, 5th edit., 259 b.

special or absolute(*g*), coupled with a right of possession(*h*). Force, moreover, does not enter as an ingredient into the constitution of a right of action in trover (*i*).

Replevin.

Replevin is usually brought for goods taken under a distress, but is, nevertheless, maintainable where there has been any wrongful taking of goods out of the possession of the party who replevies. Thus, in *Shannon* v. *Shannon*(*k*), Lord *Redesdale* says, that replevin is an action founded upon *any* taking by another party; the question to be tried in the action being, whether the party from whom the goods were taken is really entitled to them? And the above learned Judge further observes, that Blackstone, in the 3rd vol. of his Commentaries (*l*), gives too limited a definition of replevin, for "many old authorities will be found in the books of replevin being brought where there was no distress." So it is laid down, that, if a "trespasser takes beasts, replevin lies of this taking at election" (*m*). The action in question is, however, usually brought where goods have been taken under a distress either for rent or damage feasant (*n*), and is altogether a peculiar remedy. "The action of replevin," says Mr. Serjeant *Stephen* (*o*), "though entertained in the superior Courts, is not *commenced* there; and the writ of summons provided by 1 & 2 Vict.

(*g*) *Armory* v. *Delamirie*, 1 Smith L. C. 151, and note thereto; Per *Pollock*, C. B., *White* v. *Mullett*, 6 Exch. 714.

As to setting up the jus tertii in trover, see *Newnham* v. *Stevenson*, 10 C. B. 713.

(*h*) Post, Book III, Chap. 3, s. 2.

(*i*) Post, ubi supra.

(*k*) 1 Sch. & Lef. 324; *Allen* v. *Sharp*, 2 Exch. 352; *Jones* v. *Johnson*, 5 Exch. 862; *Mellor* v. *Leather*, 1 E. & B. 619; *Galloway* v. *Bird*, 4 Bing. 299; Per *Parke*, B., *George* v. *Chambers*, 11 M. & W. 159.

(*l*) P. 146.

(*m*) Vin. Abr. "Replevin," (B.), fol. 2.

(*n*) Woodf. L. & T., 6th edit., pp. 728 et seq.

(*o*) Steph. Pl., 5th edit., pp. 19, 20.

c. 110, s. 2, for the commencement of personal suit in the superior Courts, is consequently not applicable to this action. A replevin is entertained in the superior Courts by virtue of an authority which they exercise of removing suits, in certain cases, from an inferior jurisdiction, and transferring them to their own cognisance. Where goods have been *distrained*, a party making plaint to the sheriff may have them *replevied*—that is, re-delivered to him, upon giving security to prosecute an action against the distrainer, for the purpose of trying the legality of the distress; and, if the right be determined in favour of the latter, to return the goods." The action so prosecuted is called an action of replevin, and is commenced in the Sheriff's Court, being afterwards continued, however, in one of the new County Courts (*q*), whence it is removable, in certain cases, by certiorari into a superior Court.

Actions of mandamus and injunction.

The Common Law Procedure Act, 1854, has added to the above list of actions two new species, viz. the action of *Mandamus* (*r*) and the action of *Injunction* (*s*).

The former of these is a proceeding intended to enable a plaintiff to enforce on a defendant the performance of any *duty* (*t*), "in the fulfilment of which the plaintiff is personally interested." The latter, after an action has been brought upon a breach of contract, or for any other injury, is a remedy appropriate for preventing the "repetition or continuance of such breach of contract or other injury, or

(*q*) See 9 & 10 Vict. c. 95, s. 119, *Edmonds* v. *Challis*, 7 C. B. 413; *Hallawell* v. *Eastwood*, 6 Exch. 295.

(*r*) Sects. 68—77.

(*s*) Sects. 79—82.

(*t*) The better opinion seems to be, that the action of mandamus cannot be made available to compel specific performance of a *contract*—quà contract—but is appropriate merely for compelling performance of a *duty*, under circumstances such as are above stated.

the committal of any breach of contract or injury of a like kind arising out of the same contract, or relating to the same property or right;" and the plaintiff may also in the same action "include a claim for damages or other redress" (*u*).

Hitherto, the last-mentioned proceedings—by mandamus and injunction—have not been much resorted to in practice, although their scope and intention have been the subject of anxious speculation (*x*).

Parties to actions.

5. It is not proposed to treat in this volume of Parties to Actions with any considerable minuteness. For detailed information upon this subject, the reader is referred to works more technical in their character (*y*). It must suffice here merely to indicate the general principles which are to be observed, and the ordinary rules which are to be followed, in this branch of the law; and it is well to premise that cases founded merely on the relationship between trustee and cestui que trust are excluded from being considered at law, but must be carried into Equity (*z*), unless, indeed, an account has been stated between the two parties: as where

(*u*) C. L. Proc. Act, 1854, s. 79.

(*x*) See Francis' C. L. Proc., pp. 258 et seq. It would seem, that, on an application for an injunction, the rule is nisi only in the first instance: *Gittins* v. *Symes* (C. P.) M.T. 1854. As to scire facias and revivor, see post, § 5.

(*y*) Chitty Pl., vol. 1, 7th edit., chap. 1; and Broom's Prac., vol. 1. At a later page (see Book II, p. 257, post), is discussed the nature of contracts; and the reader will there find the principles on which contracts may be framed, and on which the rules for choosing parties to an action *ex contractu* must depend. So, to avoid repetition, I do not here enter upon questions relating to the capacity to contract, nor to the mode in which it may be affected, and in which rights and liabilities *ex contractu* arise. In Chap. 5 of the 2nd Book will be found all that it has been deemed necessary to say on these topics.

(*z*) *Pardoe* v. *Price*, 16 M. & W. 451; *Roper* v. *Holland*, 3 Ad. & E. 99; *Allen* v. *Impett*, 8 Taunt. 263; *Edwards* v. *Lowndes*, 1 E. & B. 81.

a trustee has admitted that he has in his hands a sum of money which is due to his cestui que trust, in which case the trustee is liable for money had and received to the use of the former party, who can accordingly sue him at law (*a*).

Plaintiffs in actions ex contractu.

The most general rule with respect to choosing the plaintiff in an action ex contractu is, that he must sue as plaintiff on the record, in whom *the legal interest* (*b*) in the contract in question is vested. Thus, in a deed *inter partes* (*c*), the legal interest generally is in those only who were privy to it; and the right of action upon it is confined to those persons only who are parties to it (*d*).

An important exception to this rule, as it affects the parties to a specialty, occurs in the case of a covenant running with the land (*e*). On any such covenant an assignee of the original grantee, who is in of the same estate as the original grantee (*f*), has the same right to sue as the party who executed the deed (*g*). At a later page I have

(*a*) *Howard* v. *Brownhill*, 23 L. J. Q. B. 23; *Roper* v. *Holland*, 3 Ad. & E. 99.

(*b*) As to who is a "party grieved" —who may sue for a penalty under an Act of Parliament, see *Boyce* v. *Higgins*, 14 C. B. 1.

(*c*) Per Lord *Ellenborough*, C. J., *Storer* v. *Gordon*, 3 M. & S. 322; *Higginbottom* v. *Burge*, 4 Exch. 667.

(*d*) As to parties suing on a deed which they have not executed, see *Morgan* v. *Pike*, 14 C. B. 473; *Swatman* v. *Ambler*, 8 Exch. 72; *Foley* v. *Addenbrooke*, 4 Q. B. 208. See too *The British Empire Mutual Life Assurance Co.* v. *Brown*, 12 C. B. 723; *Wilkinson* v. *Anglo Californian &c. Co.*, 7 Railway Cas. 511.

(*e*) *Thursby* v. *Plant*, 1 Wms. Saund. 240 (3), and the notes thereto; 32 Hen. 8, c. 34, s. 2; *Chapman* v. *Dutton*, Plowd. 284; *Magnay* v. *Edwards*, 13 C. B. 479; *West London R. C.* v. *London and North Western R. C.*, 11 C. B. 327. See also 8 & 9 Vict. c. 106, s. 5.

(*f*) *Spencer's case*, 5 Co. 16; *Middlemore* v. *Goodale*, Cro. Car. 503; Co. Litt. 385. a.; *Roach* v. *Wadham*, 6 East, 289; *Stokes* v. *Russell*, 3 T. R. 678; *S. C.*, 1 H. Bl. 562; *Virtue* v. *East Anglian R. C.*, 5 Exch. 280; *Wynn* v. *Shropshire Union R. C.*, 5 Exch. 430.

(*g*) *Holford* v. *Hatch*, 1 Doug. 183.

treated the general question of *privity* between plaintiff and defendant; and the reader will there (*h*) find the cases which illustrate this subject collected.

Who should sue on simple contract.

For determining who should sue on a *simple contract*, the simplest test applicable is this—from *whom does the consideration* (*i*) *actually move* (*k*)? Although in some of the older cases another principle may be found affirmed as pointing out the proper plaintiff, viz. that the party for whose benefit the contract is evidently made should sue thereon in his own name; yet this is not to be accepted as the law now, the former test being more accurate.

Another rule arising out of the above is, that all who have a joint legal interest in the contract, or the matter to which it relates, must join in suing on it. In a contract under seal, therefore, it is necessary to decide what covenants are *joint and several*, or admit of being so construed. The cases are very numerous in which this question has been raised; but we may lay it down generally, that, where a covenant admits of being construed as joint, and the interest of the covenantees is joint, they must join in suing upon the covenant (*l*); where, however, the interest of each of the covenantees appears on the face of the deed to be several, the words of the instrument will be taken disjunctively, and the covenant will be construed as several (*m*); and in the case of *ambiguity*, "if the words are capable of

(*h*) See post, p. 323.

(*i*) See post, p. 322; *Thomas* v. *Thomas*, 2 Q. B. 859; *Lampleigh* v. *Brathwait*, 1 Smith, L. C. 67, and note thereto.

(*k*) See *Crow* v. *Rogers*, 1 Str. 592; *Price* v. *Easton*, 4 B. & Ad. 433; *Robertson* v. *Wait*, 8 Exch. 299; *Hicks* v. *Gregory*, 8 C. B. 378; *Hartley* v. *Cummings*, 5 C. B. 247; *Cooper* v. *Parker*, 14 C. B. 118.

(*l*) *Eccleston* v. *Clipsham*, 1 Wms. Saund. 154; *Servante* v. *James*, 10 B. & C. 410.

(*m*) *Hopkinson* v. *Lee*, 6 Q. B. 964; and cases cited Broom's Prac. vol. 1, pp. 204, 206.

two constructions, you will look to the intent, and construe them according to that intent" (*m*).

Joinder of plaintiffs on simple contract.

The joinder of plaintiffs in an action on a simple contract depends on determining in whom the legal interest is. Although the terms of the contract be several, or it be entered into with one person only on behalf of all, yet all who have a joint legal interest therein must join. But when the interest of the parties is several and distinct, the parties so interested cannot maintain a joint action (*n*).

The assignment of the beneficial interest in a simple contract does not generally transfer the right of suing on it, or, as it is commonly expressed, a *chose in action is not assignable* (*o*); and hence the necessity for assignees of a chose in action making provision for suing in the names of the original assignors (*p*).

Principal and agent.

We shall find hereafter (*q*), that on the law of principal and agent are founded many of those rules which govern the election of parties in other legal relations of frequent occurrence, such for example as partnerships and associations of different kinds, coverture, insolvency, &c.; and it will be well, therefore, to state first the fundamental rule

(*m*) 3 Exch. 176; *Foley* v. *Addenbrooke*, 4 Q. B. 207.

(*n*) 2 Wms. Saund. 116, (2); *Hatsall* v. *Griffiths*, 2 Cr. & M. 679; and see *Lucas* v. *Beale*, 10 C. B. 739; *Clay* v. *Southern*, 7 Exch. 717; *Mills* v. *Alderbury Union*, 3 Exch. 590.

(*o*) The exceptions to this rule depend either upon statute, as in the case of promissory notes (3 & 4 Anne, c. 9, s. 1), or upon mercantile usage, as in the case of bills of exchange (*Hansard* v. *Robinson*, 7 B. & C. 94); as to which, see post, Book II. Chap. 3.

(*p*) Per *Buller*, J., *Master* v. *Miller*, 4 T. R. 341; *Jones* v. *Robinson*, 1 Exch. 454; *Howard* v. *Shepherd*, 9 C. B. 297; *Belcher* v. *Campbell*, 8 Q. B. 1; *Bagshawe* v. *Eastern Union R. C.*, 7 Hare, 114, *S. C.* 2 Mac. & G. 389.

(*q*) Post, pp. 332 et seq.

affecting the right of principal or agent to sue, which is this,—the principal can in general alone sue for a breach of contract entered into by him through an agent (*r*).

Partners.

Applying this rule to partnerships, as each partner may be considered, for the purpose of the partnership business, an agent for his firm (*s*), all the partners must join in suing on a contract duly made by any one of the partners on behalf of the partnership (*t*). In other words, when, in making any particular contract, the partnership has been represented by one of its members, the consequences of the law of principal and agent are involved; and so with the larger societies of persons associated together for a common undertaking, and which exist at common law,—not being under the provisions of the Registration Act, nor established by charter, letters patent, or Act of Parliament,—all the members and partners are primâ facie entitled as principals to sue upon a contract made on their account. However, when directors are appointed by deed, or otherwise, to take upon themselves the exclusive management of the concern, they will in general have a right of action upon a contract

Associations and companies.

(*r*) As to the application of this rule to factors and brokers, see *Baring* v. *Corrie*, 2 B. & Ald. 143; *Milford* v. *Hughes*, 16 M. & W. 174; *Smart* v. *Sandars*, 3 C. B. 380; and 5 C. B. 895; *Morgan* v. *Couchman*, 14 C. B. 101; *Isberg* v. *Bowden*, 8 Exch. 852; and with respect to the right of auctioneers to sue, see *Williams* v. *Millington*, 1 H. Bl. 81; *Davis* v. *Danks*, 3 Exch. 435; *Allen* v. *Hopkins*, 13 M. & W. 94; *Robinson* v. *Rutter*, 24 L. J., Q. B., 250; *Northam* v. *Bowden*, Id., Exch., 237.

(*s*) *Metcalfe* v. *Rycroft*, 6 M. & S. 75; *Wilsford* v. *Wood*, 1 Esp. 183; *Story* v. *Richardson*, 6 Bing. N. C. 123; *Walshe* v. *Provan*, 8 Exch. 843; *Cox* v. *Hubbard*, 4 C. B. 317; *Kell* v. *Nainby*, 10 B. & C. 20.

(*t*) See post, p. 559, where the reader will find, that, though the broad rule as stated in the text is generally true, there are many cases of supposed dealings with partnerships which require its modification. The effect of nonjoinder or misjoinder of partners will be seen when I come to speak of these points as they relate to pleading and practice in an action.

made with them, unless it appear that the contract was made with them as agents merely, and that they did not contract ostensibly as principals (*u*).

Contracts with provisionally registered companies.

Where a contract is made with a company before its complete registration, the proper parties to be made plaintiffs in suing on it, depend upon the questions, by whom and for whom was the contract made (*x*). The proper plaintiff to sue on behalf of a completely registered joint stock company is regulated by the 7 & 8 Vict. c. 110 (ss. 25 et seq.), which gives the right to such company to sue by their registered name (*y*). So companies established by letters patent, under 1 Vict. c. 73, may be empowered by the Crown to sue by a registered officer; and banking companies (according to their respective constitutions) are regulated in their mode of suing—by their 'public officer,' or otherwise,—by the provisions made in the various statutes which have been passed from time to time, with relation to them (*z*). When a corporation is put in the position of plaintiff, in respect of a contract duly entered into on its behalf, it should sue, in its corporate name, by attorney, who must be appointed under seal (*a*).

—completely registered companies.

Companies by letters patent.

Banking companies.

Coverture.

The effect of coverture at common law is to render the wife incapable of entering into a contract as principal; and she

(*u*) See Broom's Prac. p. 249. As to trustees of such associations suing, see *Skinner* v. *Lambert*, 5 Scott, N. R. 197. See also *Metcalf* v. *Bruin*, 12 East, 400; *Megginson* v. *Harper*, 2 Cr. & M. 322; *Lefevre* v. *Boyle*, 3 B. & Ad. 877.

(*x*) *Duke* v. *Forbes*, 5 D. & L. 198; *Woolmer* v. *Toby*, 10 Q. B. 691.

(*y*) See also the Companies Clauses Consolidation Act (8 & 9 Vict. c. 16).

(*z*) 6 Geo. 4, c. 32; 7 Geo. 4, c. 46; 1 & 2 Vict. c. 96; 7 & 8 Vict. c. 113 (see p. 568, post).

(*a*) Co. Litt. 66. b.; *Arnold* v. *Mayor of Poole*, 5 Scott, N. R. 741; *Reg.* v. *Justices of Cumberland*, 5 D. & L. 431, n. (*a*); and see post, pp. 568—578.

can therefore only act in such matter as agent of her husband (*b*). The relation, however, of husband and wife leads to various rules with respect to suing in actions on contract, which admit of being thus briefly stated:—1st. The husband must sue *alone* in respect of any estate and property which are by act of law absolutely vested in him, although they may have accrued to him in right of his wife (*c*).

2nd. The *wife* cannot sue *alone*, whether the right of action accrued before or after coverture (*d*).

3rd. When the cause of action accrues to the husband during coverture in right of his wife, he may in general elect either to sue *alone or jointly* with her. "As to property acquired after marriage," says *Parke*, B., in *Bendix* v. *Wakeman* (*e*), "the husband may elect either to take it himself or to give his wife an interest in it;" and in these cases, when the wife has such an interest as would survive to her in the event of the husband's death, she may be well joined with him as a co-plaintiff (*f*).

4th. The wife must be joined as plaintiff with the husband when a complete cause of action has accrued to the feme

(*b*) See pp. 596 et seq., post, and the cases there cited.

(*c*) *Dengate* v. *Gardiner*, 4 M. & W. 7; *Saville* v. *Sweeney*, 4 B. & Ad. 514, 522, 524; Bac. Abr. and Com. Dig. "Bar. & Feme;" *Bidgood* v. *Way*, 2 W. Bl. 1236; *Abbot* v. *Blofield*, Cro. Jac. 644.

(*d*) Divorce *a vinculo matrimonii*, the banishment, attainder, or presumed death of the husband, (*Doe* d. *Knight* v. *Nepean*, 5 B. & Ad. 94), may cause an exception to this rule. As to the custom of the City of London, see *Caudell* v. *Shaw*, 4 T. R. 361.

(*e*) 12 M. & W. 97.

(*f*) *Ayling* v. *Whicher*, 6 Ad. & E. 264; *Bret* v. *Cumberland*, Cro. Jac. 309; *Beadle* v. *Sherman*, Cro. Eliz. 608; *Arnold* v. *Bidgood*, Cro. Jac. 318; *Philliskirk* v. *Pluckwell*, 2 M. & S. 393; *Brashford* v. *Buckingham*, Cro. Jac. 77; *Wills* v. *Nurse*, 1 Ad. & E. 67.

dum sola, as for breach of covenant, or on a bond, bill of exchange, or promissory note, or in respect of a debt due to her before coverture (*g*), or on a chose in action, which became vested in the feme before marriage, though the cause of action has accrued during coverture; or where the cause of action accrues to the wife in *autre droit*, and would therefore survive to her (*h*).

Before the Common Law Procedure Act, 1852, came into operation, the marriage of a feme whilst an action was pending caused it to abate, but the 141st section of that statute remedies this defect, and the action may now "be proceeded with to judgment;" and further, "in case of a judgment for the wife execution may issue thereon by the authority of the husband without any writ of revivor or suggestion."

In regard to the capacity of an infant, lunatic, or alien to contract, I shall have somewhat to say hereafter (*i*); there are, however, no rules specially affecting an individual so circumstanced which here require notice.

Executors and administrators.

The only rule with respect to executors and administrators, being plaintiffs, which need now be stated, is the very general one, that, whenever the *legal* interest in a contract is vested in them, they may sue. As personal representatives of the deceased, to them is committed the right of seeking the remedies for damage sustained by his personal

(*g*) *Wootton* v. *Steffenoni*, 12 M. & W. 129; *Brereton* v. *Evans*, Cro. Eliz. 700; *Gaters* v. *Madeley*, 6 M. & W. 423; *Hart* v. *Stephens*, 6 Q. B 937; *Scarpellini* v. *Atcheson*, 7 Q. B. 864; *Hopkins* v. *Logan*, 5 M. & W. 241; *Sherrington* v. *Yates*, 12 M & W. 855. See also *Dalton* v. *Midland Counties R. C.*, 13 C. B 474; *Procter* v. *Brotherton*, 9 Exch. 486.

(*h*) *Richards* v. *Richards*, 2 B. & Ad. 447; *Field* v. *Allen*, 9 M. & W. 694, 699.

(*i*) See post, pp. 589, 609, 615, and 627.

estate (*k*); but though a personal representative must always sue in that character, in respect of a contract made with the deceased, yet, when it has been made with himself subsequently to the death of the testator or intestate, and when the damages in an action thereon would be assets, he may sue either as the personal representative, or in his individual capacity (*l*).

When there are several executors, they have a joint and entire interest in the testator's goods, and must therefore, on the principle before stated, be joined as plaintiffs, even when one only of them has proved the will (*m*).

Bankrupts.

So, likewise, with assignees in bankruptcy and insolvency, the right of action is vested in them as representing the insolvent parties for the benefit of creditors, by virtue of the statutes relating to these subjects (*n*); and it may be laid

(*k*) See post, p. 616; Williams' Executors generally; *Lucy* v. *Levington*, 2 Lev. 26; *Morley* v. *Polhill*, 2 Vent. 56; and see observations per *Parke*, B., 2 Cr. M. & R. 592, 594; *Ricketts* v. *Weaver*, 12 M. & W. 718; *Smith* v. *Simonds*, Comb. 64; *Kingdon* v. *Nottle*, 1 M. & S. 355, 4 M. & S. 53; *King* v. *Jones*, 4 M. & S. 188; *Raymond* v. *Fitch*, 2 Cr. M. & R. 598, 599; *Orme* v. *Broughton*, 10 Bing. 537; *Doe* d. *Rogers* v. *Rogers*, 2 N. & M. 555; *Cooper* v. *Johnson*, 2 B. & Ald. 394; *Rhodes* v. *Haigh*, 2 B. & C. 346, 347; *M'Dougal* v. *Robertson*, 4 Bing. 435; *Tyler* v. *Jones*, 3 B. & C. 144; *Clarke* v. *Crofts*, 4 Bing. 143; *Knights* v. *Quarles*, 2 B. & B. 102; *Moreron's case*, 1 Vent. 30; 4 Geo. 2, c. 28, s. 1; *Berwick* v. *Andrews*, 2 Ld. Raym. 971; *Allen* v. *Hopkins*, 13 M. & W. 94; *Chamberlain* v. *Williamson*, 2 M. & S. 408; *Beckham* v *Drake*, 8 M. & W. 854.

(*l*) 1 Wms. Saund. 112, n. (1); Com. Dig. "Pleader" 2, D. 1; *Marshall* v. *Broadhurst*, 1 C. & J. 403; *Edwards* v. *Grace*, 2 M. & W. 190; *Werner* v. *Humphreys*, 3 Scott, N. R. 226; *Gallant* v. *Boutefloower*, 3 Doug. 34; *Aspinall* v. *Wake*, 10 Bing. 51; *King* v. *Thom*, 1 T. R. 487.

(*m*) *Webster* v. *Spencer*, 3 B. & Ald. 363. See *Venables* v. *East India Co.*, 2 Exch. 633.

As to the right to sue on a part-performed contract, see *Edwards* v. *Grace*, suprà, and *Crosthwaite* v. *Gardner*, 21 L. J., Q. B. 356; and, with respect to limitation of actions, see 2 Wms. Exors. 4th edit. 1601.

(*n*) See Bankrupt Law Consolidation Act, 1849, (12 & 13 Vict. c.

down generally, that all the remedies which a bankrupt would have had, if he had not become bankrupt, with respect to his whole *estate*, real or personal (*o*), whether in possession, remainder, or reversion, at the date of the bankruptcy, including all outstanding debts and assets, vest in his assignees (*p*), who may sue, therefore, in respect of those contracts which they can adopt and elect to adopt. And so with regard to insolvency (*q*), there is in this respect no distinction between the Insolvent and Bankrupt Acts; but all the rights of action are transferred to the assignees in the one case as well as the other (*r*), and all rights of action *ex contractu*, vested in the insolvent previous to the petition and vesting order, are transferred to the assignees (*s*). However, it has been held that an insolvent who has taken the benefit of the statute 1 & 2 Vict. c. 110, may sue for a debt which accrued to him *after* the vesting order, and *before* his final discharge, unless the provisional assignee has claimed the debt (*t*).

Insolvents.

106), ss. 141, 142, 153, and post, pp. 621—624.

(*o*) *Simmons* v. *Edwards*, 16 M. & W. 838; *Drake* v. *Beckham*, 11 M. & W. 315; *M'Intyre* v. *Miller*, 13 M. & W. 730; *Smith* v. *Keating*, 6 C. B. 136.

(*p*) *Kearsey* v. *Carstairs*, 2 B. & Ad. 724; *Schondler* v. *Wace*, 1 Camp. 487; *Clay* v. *Harrison*, 10 B. & C. 99; *Power* v. *Butcher*, 10 B. & C. 329; *Brandon* v. *Pate*, 2 H. Bl. 308; *Chandler* v. *Gardiner*, cited 2 B. & Ad. 734; *Savory* v. *Chapman*, 11 Ad. & E. 829; *Hill* v. *Smith*, 12 M. & W. 618; *Alder* v. *Keighley*, 15 M. & W. 117; *Porter* v. *Vorley*, 9 Bing. 93, 95; *Wright* v. *Fairfield*, 2 B. & Ad. 727; *Whitmore* v. *Gilmour*, 12 M. & W. 808. See *Gibson* v. *Carruthers*, 8 M. & W. 321; *Lawrence* v. *Knowles*, 5 B. & C. 399; *Twemlow* v. *Askey*, 3 M. & W. 495.

(*q*) 1 & 2 Vict. c. 110; 5 & 6 Vict. c. 116; 7 & 8 Vict. c. 96.

(*r*) Per *Littledale*, J., in *Swann* v. *Sutton*, 10 Ad. & E. 631; see post, p. 622.

(*s*) As to the exception of an assignment of a bond or debt before insolvency, with notice thereof to the debtor, see cases cited post, p. 622.

(*t*) *Jackson* v. *Burnham*, 8 Exch. 173; *Stanton* v. *Collier*, 3 E. & B. 274; and see post, p. 623.

Defendants ex contractu.

Having thus briefly disposed of the right of plaintiffs to sue, we come to the liabilities of defendants to be sued in actions of contract; and here the first elementary rule, perhaps, which can be laid down is, that he must be the defendant in an action on a simple contract (*u*) by whom or on whose behalf such contract was concluded (*x*). Whence it follows also, that, in general, the liability upon a contract is not assignable at law (*y*).

On simple contract.

Joinder of defendants on a simple contract.

The joinder of defendants on a simple contract will of course depend upon the character of the contract in question, and on determining how far it is a joint or a several, or a joint and several, contract (*z*). In order to charge several persons jointly on a verbal contract, it will not be enough to shew that credit was given to them jointly, without some proof of their contracting jointly, either expressly or impliedly, or that the work done was for their joint benefit (*a*); and whether the contract in question be written or verbal, it will, in the absence of any express provision or stipulation by the parties themselves, be taken to be a joint, and neither a joint and several, nor a several contract, and all parties liable must be joined in suing upon it (*b*).

(*u*) See post, p. 308.

(*x*) *Webb* v. *Rhodes*, 3 Bing. N. C. 732; 2 Bl. Com. p. 443; *Appleton* v. *Binks*, 5 East, 148; *Jenkins* v. *Hutchinson*, 13 Q. B. 744; *Hamber* v. *Hall*, 10 C. B. 780; *Moffatt* v. *Dickson*, 13 C. B. 543.

(*y*) See post, p. 442; *Fairlie* v. *Denton*, 8 B. & C. 400; *Stewart* v. *Fry*, 7 Taunt. 339; *Dickinson* v. *Marrow*, 14 M. & W. 713; *Forth* v. *Stanton*, 1 Wms. Saund. 210, n. (*a*); *Chambers* v. *Jones*, 5 Exch. 229; and the cases cited in Broom's Prac., vol. 1, p. 353.

(*z*) Per Lord *Denman*, C. J., 1 Ad. & E. 207, 208; *Kirby* v. *Banister*, 5 B. & Ad. 1069; *Gibson* v. *Lupton*, 9 Bing. 297.

(*a*) *Eaden* v. *Titchmarch*, 1 Ad. & E. 691; *Arnold* v. *Bainbrigge*, 9 Exch. 153; *Maclae* v. *Sutherland*, 3 E. & B. 1; *Fell* v. *Goslin*, 7 Exch. 185; *Forster* v. *Taylor*, 3 Camp. 49.

(*b*) See Broom's Prac., vol. 1, pp. 354–5, and cases there cited.

On a written contract, joint and several, the plaintiff may sue all the contracting parties jointly, or any one individually (*c*).

Defendants on a specialty.

On a specialty the party to be sued is generally pointed out in the deed in express terms, and the choice of such party will ordinarily present no difficulty. To make the heir liable, he must be expressly named in the specialty; and when a person by bond or covenant (whether real or personal), or, indeed, by any specialty, binds himself *and his heirs*, the heir and devisee are each liable for the default of the ancestor or testator to the extent of the assets, freehold and copyhold, taken by descent or devise, and they may be jointly sued; and if there be no heir, the devisee may now be sued alone (*d*). So, with regard to the assignment of liability by death to the personal representatives of the obligor or covenantor, they are liable to the extent of the assets, whether they be named or not; and when the real and personal representatives are alike liable, the plaintiff may elect to sue both, or either separately (*e*).

When heirs and devisees liable.

Joinder of defendants on a specialty.

The joinder of defendants liable on a contract under seal may be briefly stated to be comprised in the two rules:—1. That, when the obligation is joint, all parties chargeable must be made co-defendants on its breach. 2. That, when it is in terms joint and several, the covenantee may elect to sue either one or all of the covenantors, notwithstanding

(*c*) *Lee* v. *Nixon*, 1 Ad. & E. 201.

(*d*) 11 Geo. 4 & 1 Will. 4, c. 47; 11 & 12 Vict. c. 87; *Hunting* v. *Sheldrake*, 9 M. & W. 256; *Barber* v. *Fox*, 2 Wms. Saund. 136, 137 b; Co. Litt. 209. a.; *Farley* v. *Briant*, 3 Ad. & E. 847; *Braithwaite* v. *Skinner*, 5 M. & W. 313.

(*e*) *Davies* v. *Churchman*, 3 Lev. 189; *Dary* v. *Pepys*, Plowd. 439 b; and see Wms. Exors., 4th edit., p. 1645.

their legal interest in the subject-matter of the covenant be joint (*f*).

Liability of principal or agent.

The leading propositions as to the respective liability of principal and agent on a contract entered into by the latter, as well as the liabilities consequent on the relationship and association of persons as co-partners, will be found treated of at a later page of this volume (*g*), and it is therefore not necessary to enter upon these subjects here.

Partners.

Public companies.

With respect to those larger associations which exist at common law only, though differing from ordinary partnerships in some respects, they resemble them at least so far as the liability of their various members is concerned. If a partnership of this kind really has been formed, and set in operation, any one proved either to be a member of it, or to have held himself out as a partner in the concern, would be liable on an action brought against him for contracts duly entered into on the part of the association by the secretary or other authorised officer of the association (*h*), who is held for such purpose to be the agent of each member of the association. So, in a club where any member or committee of members, or appointed officer, is really the agent authorised to pledge the credit of all the members of the club, they may be made liable as co-defendants when their credit has been so pledged (*i*).

(*f*) *Cabell* v. *Vaughan*, 1 Wms. Saund. 291 b, n. (4); *Eccleston* v. *Clipsham*, 1 Wms. Saund. 154 a; and see *King* v. *Hoare*, 13 M. & W. 494.

(*g*) Pp. 554 et seq.

(*h*) *Wood* v. *The Duke of Argyll*, 7 Scott, N. R. 885; and see *Steigenberger* v. *Carr*, 3 Scott, N. R. 466; *Ricketts* v. *Bennett*, 4 C. B. 686; *Fox* v. *Clifton*, 6 Bing. 776; *Pitchford* v. *Davis*, 5 M. & W. 2; *Beech* v. *Eyre*, 6 Scott, N. R. 735; *Dickinson* v. *Valpy*, 10 B. & C. 128.

(*i*) *Todd* v. *Emly*, 8 M. & W. 505; *Burls* v. *Smith*, 7 Bing. 705; *Braith-*

Liability of companies under 7 & 8 Vict. c. 110.

Since the Joint Stock Companies Registration Act (*j*), a very large number of partnerships are brought within its provisions (*k*), and those companies which require the authority of Parliament for carrying out their objects must still observe the process of registration (see sects. 7 and 9 of the Act). When a project comes within the Registration Act, it must be first provisionally registered. Until this is done, no contract can be made on behalf of the intended company; and any liability for preliminary expenses incurred will fall on the individual who, either directly as principal or mediately through an agent, gave any particular order, or held himself out as liable thereon.

Subsequent to provisional and prior to complete registration of a company, certain contracts may be entered into on behalf of the proposed company, viz. such as are necessary for its construction (*l*). With respect to these contracts, then, if they were proved to have been entered into on behalf of the aggregate body of the members or shareholders, and credit were given to them—which according to the ordinary mode of transaction is not the case—then no doubt all the members would be liable. The difficulty, however, of joining a large number of individuals as defendants would be in most cases insurmountable; for, until com-

waite v. *Skofield*, 9 B. & C. 401; *Glevester* v. *Hunter*, 5 Car. & P. 62; *Delauney* v. *Strickland*, 2 Stark. Rep. 416; *Bell* v. *Francis*, 9 Car. & P. 66; *Flemyng* v. *Hector*, 2 M. & W. 172; *Tyrrell* v. *Woolley*, 2 Scott, N. R. 171; *Earl of Mountcashel* v. *Barber*, 14 C. B. 53.

(*j*) 7 & 8 Vict. c. 110.

(*k*) The definition of a joint stock company is given by the Act, see sect. 2.

(*l*) *Taylor* v. *Crowland Gas and Coke Co.*, 10 Exch., 293; *Preston* v. *The Liverpool, Manchester, and Newcastle-upon-Tyne R. C.* 17 Beav. 114.

plete registration, the company cannot be sued by its registered name; so that the best course here would be, to sue either the parties who ostensibly and directly entered into the contract, or the "managing committee." This would throw the onus upon the defendant, if he wished to take advantage of the *non-joinder* of his fellow shareholders, of pleading it in abatement. The reports of late years abound with cases upon the various liabilities of shareholders, members of provisional and managing committees, directors, and indeed of all concerned with companies in their different stages of existence (*m*). We may deduce from these cases, that, when one merely agrees to act with others for the purpose of carrying into effect a particular scheme, neither is a co-partnership to be assumed necessarily to arise thereon, nor a quasi co-partnership, such as shall of itself render any one of the individuals so associated together agent for any other or for all the others for the purposes of attaining their common object. It is not merely by agreeing to act with others that a man is rendered liable on contracts made by those associated with him; but, if by his consent, conduct, or ratification he authorise any one to act for him, and work is done, and credit given on the faith of his responsibility, he will then become liable in respect of contracts which have been thus entered into.

(*m*) *Reynell* v. *Lewis*, *Wyld* v. *Hopkins*, 15 M. & W. 517. See also *Landman* v. *Entwistle*, 7 Exch. 631; *Wilson* v. *Viscount Curzon*, 15 M. & W. 532; *Smith* v. *Hull Glass Co.* 21 L. J., C. P., 106; *Bailey* v. *Macaulay*, 13 Q. B. 815; *Newton* v. *Belcher*, 12 Q. B. 921; *Halket* v. *Merchant Traders &c. Insurance Co.*, 13 Q. B. 960; *Barnett* v. *Lambert*, 15 M. & W. 493; *Williams* v. *Pigott*, 2 Exch. 201.

There is another class of actions arising out of associations of this sort, viz. when an allottee of shares sues the managing committee for the recovery of his deposit, on the failure of consideration, or on the ground of fraudulent misrepresentation.

The result of the cases (*n*) on this subject seems to amount to this, that if the contract between the allottee and the committee appears to have been, that the money should be advanced by the allottee upon the stipulation that it is to be expended in preliminary expenses, then the deposit cannot be recovered if it has been so expended, although the scheme fail. When, however, the action will lie,—either in the absence of such stipulation or on similar grounds to those stated in *Walstab* v. *Spottiswoode* (*o*),—then, in seeking a defendant amongst the committee of management, the plaintiff should choose one who has taken an active part in the concern, and by whom it may be sufficiently shewn that the deposit was in fact had and received to the use of the plaintiff (*p*).

Completely registered company.

So soon as a company has been completely registered, it may enter into contracts and perform other acts necessary for carrying into effect the purposes of the company, and it may then both sue and be sued by its registered name (*q*).

(*n*) *Walstab* v. *Spottiswoode*, 15 M. & W. 501; *Nockels* v. *Crosby*, 3 B. & C. 814; *Garwood* v. *Ede*, 1 Exch. 264; *Ward* v. *Lord Londesborough*, 12 C. B. 252; *Clements* v. *Todd*, 1 Exch. 268; *Jones* v. *Harrison*, 2 Exch. 52; *Wontner* v. *Shairp*, 4 C. B. 404; *Watts* v. *Salter*, 10 C. B. 477.

(*o*) See supra, n. (*n*)

(*p*) *Moore* v. *Garwood* (in Error), 4 Exch. 681; *Burnside* v. *Dayrell*, 6 Rail. Cas. 67; *Drouet* v. *Taylor*, 16 C. B. 671.

(*q*) See *Woolf* v. *The City Steamboat Co.*, 7 C. B. 103; 7 & 8 Vict. c. 110, ss. 25, 27, 61; *Maclae* v. *Sutherland*, 3 E. & B. 1. Those Companies, however, which require also the authority of Parliament to enable them to carry into execution their projects—such as railway, dock, and similar public works, can enter into contracts only *condition-*

Chartered companies.

Chartered companies, under 1 Vict. c. 73, must be sued according to the provisions contained in the charter; whilst companies which are incorporated by special Act may have clauses inserted therein affecting and regulating their liability, their mode of entering into contracts, and the remedies against them, and these must be considered either alone or in conjunction with the general clauses of the Companies Clauses Consolidation Act (*r*).

It can only be noticed here, that the Joint Stock Companies Winding-up Act, 1848, (11 & 12 Vict. c. 45), regulates the prosecution of a suit against a company brought within its provisions.

Banking company.

The proper defendants in an action against a banking company, established under 7 Geo. 4, c. 46, are declared, by

ally upon their obtaining their Acts of Incorporation.

The difference between contracts entered into by a partner of an ordinary copartnership, and those made on behalf of a joint stock company, is well exhibited in *Parke*, B.'s judgment in *Ridley* v. *Plymouth, Devon, &c., Co.*, 2 Exch. 711; and see *Kingsbridge Mill Co.* v. *Plymouth Baking Co.*, 2 Exch. 718. The mode in which completely registered public companies may contract is regulated by the 44th and following sections of 7 & 8 Vict. c. 110, by which it will be seen that the contracts which companies may enter into are classified with respect to different formalities required on entering into them. The Companies Clauses Consolidation Act (8 & 9 Vict. c. 16), as well as the Joint Stock Companies Registration Act, must also be referred to in regard to the proceedings proper in an action against a company, from the summons down to execution, and the ultimate liability of the property of the shareholder if the effects of the company are insufficient. See also *Smith* v. *Hull Glass Co.*, 8 C. B. 668; *Edwards* v. *Cameron's Coalbrook Steam Coal Co.*, 6 Exch. 269; *Walton* v. *The Universal Salvage Co.*, 16 M. & W. 438; *Evans* v. *Dublin and Drogheda R. C.*, 2 D. & L. 865; *Peart* v. *The Universal Salvage Co.*, 6 C. B. 478; *Abbot* v. *Rogers*, 16 C. B. 277; *In re Weiss*, 15 C. B. 331.

(*r*) 8 & 9 Vict. c. 16, intituled "An Act for consolidating in one Act certain provisions usually inserted in Acts with respect to the constitution of companies incorporated for carrying on undertakings of a public nature." And see *Beech* v. *Eyre*, 6 Scott N. R. 327; *Bradley* v. *Eyre*, 11 M. & W. 432; *Bradley* v. *Warburg*, 11 M. & W. 432; *Philipson* v. *Earl of Egremont*, 6 Q. B. 587.

the 9th section of that Act, to be one (or more) of the public officers to be nominated as the nominal defendant for and on behalf of the copartnership (*s*); and sect. 12 enacts, that when judgment shall be recovered against the public officer it shall have the "like effect and operation upon and against the property of such copartnership, and upon and against the property of every such member thereof," as if such judgment had been recovered against such copartnership; and that the bankruptcy or insolvency of any such public officer shall not be construed to be the bankruptcy or insolvency of the co-partnership; and that the liability of the partnership and of its members shall not be affected thereby.

Banking companies established since 6th May, 1844, are regulated by the 7 & 8 Vict. c. 113; and to its various sections relating to the liabilities of the shareholders for the contracts of the companies as well as inter se, I must refer the reader.

Corporation.

A corporation must be sued in its corporate name, and the individual members of the corporation are protected as to their property, the remedy being against that of the corporation only.

At a later page (p. 568) I have entered into questions arising in regard to the mode in which a corporation may contract, and the reader will there find cited the cases which illustrate both the general rule that a corporation can contract only under seal,—and the exceptions to that rule.

Coverture.

When a husband has been rendered liable to be sued on a contract made by his wife during coverture (*t*), inasmuch as we have seen she could only have entered into it as his

(*s*) *Steward* v. *Greaves*, 10 M. & W. 711; *Steward* v. *Dunn*, 12 M. & W. 655; *Needham* v. *Law*, 11 M. & W. 400; *Dodgson* v. *Scott*, 2 Exch. 467.

(*t*) *Reid* v. *Teakle*, 13 C. B. 627.

agent, the husband must be sued alone; but for breaches of contracts made by the wife before her marriage, or for debts incurred by her before her marriage, both husband and wife must be jointly sued (*u*). And when the cause of action has occurred against the feme in *autre droit*, she must be sued jointly with her husband (*v*).

There are certain cases where the wife may either be sued jointly with the husband or he may be sued alone; such are actions for rent, due *after* the marriage but accruing under a lease made to the wife before it (*x*), or under a lease which the wife has as executrix or administratrix. So, if covenants are made in a lease to husband and wife jointly, they may be joined as defendants in an action on the covenants (*y*).

Executors and administrators.

With regard to executors and administrators (*z*), we may state the general rule to be, that the personal representatives of the deceased, though not expressly named (*a*), are liable, to the extent of the assets, on all his covenants and contracts broken in his lifetime, and on such as are broken after his death, provided that his skill or taste were not required for their performance (*b*), and that they were not to be performed by him in person or limited expressly to his lifetime (*c*).

(*u*) Bac. Abr. "Bar. & Feme" (L.), Vin. Abr. "Bar. & Feme" (X.), pl. 15; *Mitchinson* v. *Hewson*, 7 T. R. 348; *Robinson* v. *Hardy*, 1 Keb. 281; *Norwood* v. *Stevenson*, Anders. 227; *Tracey* v. *M'Arlton*, 1 Dowl. 532; *Evans* v. *Morgan*, 2 C. & J. 453; *Leader* v. *Barry*, 1 Eq. 353.

(*v*) *Mounson* v. *Bourn*, Cro. Car. 518; *Kings* v. *Hilton*, Id. 603; Com. Dig. "Administration" (D.).

(*x*) Com. Dig. "Bar. & Feme" (Y.).

(*y*) Bac. Abr. "Bar. & Feme" (L.); and see also *Lake* v. *Smith*, 1 N. R. 174; and post, pp. 596—607.

(*z*) See post, p. 616.

(*a*) *Williams* v. *Burrell*, 1 C. B. 402.

(*b*) *Siboni* v. *Kirkman*, 1 M. & W. 423.

(*c*) *Hyde* v. *Dean and Canons of Windsor*, Cro. Eliz. 552; and see Broom's Prac. p. 488.

Thus, in *Hambly* v. *Trott* (*d*), Lord *Mansfield* lays it down, that, "when the cause of action is money due, or a contract to be performed, gain or acquisition of the testator by the work and labour or property of another, or a promise of the testator, express or implied,—where these are the causes of action, the action survives against the executor."

In general, all the executors named in the will—unless when any one of them has formally renounced—should be joined as co-defendants.

Assignees in bankruptcy.

As we have seen, in speaking of plaintiffs, that the effect of bankruptcy is to divest the bankrupt of all property in which he is beneficially interested (*e*) for distribution amongst his creditors, so it equally operates to protect the bankrupt from liability in respect of contracts prior to the bankruptcy and certificate (*f*): and if he is sued in respect of them after he has obtained his certificate, he can plead it in bar (*g*). It is indeed expedient for a plaintiff who sues for a debt provable against the estate of the defendant, to discontinue the action in the event of his bankruptcy, and go in and prove his debt under the bankruptcy: but whilst a bankrupt is uncertificated, he is liable to be sued for all debts and demands which are not proved

(*d*) 1 Cowp. 375. See also *Ex parte Tindal*, 8 Bing. 404; *Powell* v. *Graham*, 7 Taunt. 580; and cases cited p. 618 post. See, too, 3 & 4 Will. 4, c. 42, s. 14; 4 & 5 W. & M. c 24, s. 12; *Prior* v. *Hembrow*, 8 M. & W. 889, 890; 2 Wms. Exors. 4th edit. 1471.

(*e*) And see post, p. 578.

(*f*) As to goods in the order and disposition of a bankrupt, see *Heslop* v. *Baker*, 6 Exch. 740; *Young* v. *Winter*, Trin. T., 1853; and as to the title of the assignees to goods in the reputed ownership of the bankrupt, see *Fawcett* v. *Fearne*, 6 Q. B. 20.

(*g*) 12 & 13 Vict. c. 106, s. 205; but see *Wesson* v. *Allcard*, 7 Exch. 753, and 8 Exch. 260, *S. C.* (in Error).

under his bankruptcy (*h*), whether they be susceptible of proof or not, provided that a complete cause of action has accrued against him.

The assignees of a bankrupt are not liable on any contract of his, unless they choose to adopt it (*i*); and thus it is within their discretion to elect whether they will accept or decline a lease held by the bankrupt; but if they accept it, they accept also the liability upon the covenants contained in it (*k*).

Insolvency.

The statutes relating to insolvency have given rise to no small difficulty in their construction, especially as regards the effect upon the insolvent's liability and the benefit intended to be afforded to him. In *Francis* v. *Dodsworth* (*l*) the operation of the 1 & 2 Vict. c. 110, was discussed at some length. The Court there said, "It is to be observed, that before the debtor is entitled to his discharge, he is required to give a judgment to the assignee of the Court; so that a judgment is, in effect, obtained for the benefit of every creditor for his debt. . . . . It will be observed, further, that both the insolvent's person and his future effects are protected against actions and judgments in respect of the scheduled debts, whether such judgments are obtained before or after the discharge, and also against both actions and judgments founded upon new contracts relating to the

(*h*) *Walker* v. *Pilbeam*, 4 C. B. 229.

(*i*) As to their liability on calls for railway shares, see *The South Staffordshire R. C.* v. *Burnside*, 5 Exch. 129.

(*k*) See 7 & 8 Vict. c. 70, which relates to debtors unable to meet their engagements with creditors, and who are not traders within the meaning of the Bankrupt Acts. By sect. 6 of this Act, the trustees of the estate of a debtor petitioning under this Act may sue and be sued as if they were such assignees in bankruptcy; see *Blackford* v. *Hill*, 15 Q. B. 116.

(*l*) 4 C. B. 218–9. See also *Thompson* v. *Whatley*, 16 Q. B. 189; *Phillips* v. *Shervill*, 6 Q. B. 944.

scheduled debts; and the insolvent is entitled to plead his discharge in a general form in bar of any such action. It appears, therefore, that although the debt is not in terms extinguished, or the insolvent discharged therefrom, yet laborious care has been taken to exclude and bar all means by which the debtor, who has given up the whole of his property, could, in respect of his former debts, be in any way coerced by the creditors individually, or his future effects in any way made liable to the payment of the scheduled debts." . . . . Although moreover a debt is not extinguished by the debtor's passing through the Insolvency Court, nor is the insolvent *in terms* discharged from it; yet by the 91st section of the above statute, the order or adjudication of discharge is a good defence to any action for a debt inserted in the insolvent's schedule. We may receive now as settled law, that the effect of the final order for protection under the stats. 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, not only is a protection to the person of the insolvent, but is pleadable as an absolute bar to an action for any debt included in the schedule.

By the first of these Acts, on the passing of the final order all the estate present and future of the insolvent vests in the assignees as under a fiat; but the assignees (by s. 9) must file a claim in order to take after-acquired effects. Thus the result is, that the assignees take all present property absolutely, and have a right to obtain all that is subsequently acquired by the insolvent (*m*). Hence, whatever may be the right of any creditor to make an insolvent a defendant in an action, the latter is by law provided with

(*m*) *Jacobs* v. *Hyde*, *Platel* v. *Bevill*, *Turner* v. *Pulman*, 2 Exch. 508; *Nash* v. *Brown*, 6 C. B. 584; *Kernot* v. *Cattlin*, 2 E. & B. 790. As to certain liabilities of the trade and official assignees respectively, see *Hamber* v. *Hall*, 10 C. B. 797, 798.

adequate grounds of defence to it, where justice requires that he should be so (*n*).

Plaintiffs in actions ex delicto.

In former parts of this volume it has been attempted to define what are "legal" rights, and what is the nature of a "tort," which when committed renders one who is injured thereby capable of suing, and one who commits it liable to be sued, in an action ex delicto. It is obvious, that, upon such considerations are based the principles upon which parties to actions of tort should be selected; and in order to obviate repetition, reference must also occasionally be made, as before, to a subsequent portion of the work (*o*).

The most general rule, amounting almost to a self-evident proposition, for selecting the plaintiff in an action ex delicto, is this—that he must be the plaintiff whose legal right or property has been affected by the tortious act of another (*p*).

Trespass—qu. cl fr.

The proper plaintiff in trespass qu. cl. fr., according to the rule above laid down, is he who is in possession at the time of the trespass—and, as against any one who cannot

(*n*) *Owen* v. *Routh*, 14 C. B. 327; *Hookpayton* v. *Bussell*, 9 Exch. 279; *Wilkin* v. *Manning*, 9 Exch. 575.

As to the liability of an insolvent debtor on his lease under 7 & 8 Vict. c. 96; and the right of electing to accept it or not on the part of the assignees, see sect. 12.

As to the effect of a final order on a judgment in an action of *tort*, signed after the final order, see *Beavan* v. *Walker*, 12 C. B. 480.

(*o*) See ante, Chap. 3; post, Book IV., Chaps. 2, 3.

(*p*) See per Lord *Kenyon*, C. J., *Dawes* v. *Peck*, 8 T. R. 332. Although it follows from this rule that there can be no assignment of his right to sue by the party who has been injured, yet it should be observed, that the assignee of property must sue for a tort committed thereto subsequently to the assignment, as in detinue for title deeds, though delivered by the assignor to a third party previously to the assignment of the estate; for when the action was commenced, the property was in the assignee, *Philips* v. *Robinson*, 4 Bing. 106; and the same rule holds in trover for goods, *Pattison* v. *Robinson*, 5 M. & S. 105; or in case for the infringement of a copyright, *Davidson* v. *Bohn*, 6 C. B. 456.

show a better title, mere possession will suffice to support the action (*q*). But neither a lessor who is out of possession, nor a mortgagee who has not entered into possession, can be plaintiff in an action of trespass for a tortious entry on the land leased or mortgaged (*r*).

—de bonis asportatis.

So in an action of trespass de bonis asportatis, the proper plaintiff is he who had either actual or constructive possession of the chattels taken and carried away (*s*). An auctioneer may sue in trespass for wrongfully taking away the goods confided to him for sale (*t*). Where goods and chattels are consigned to him, he has, moreover, a special property in them—not only when they are in his own salerooms, but even when in the house of another, if there for the purpose of sale—and he may therefore maintain trespass or trover for them, though not for certain fixtures, nor for damage to the realty, nor for the removal of growing crops (*u*) which he has been directed to sell.

Case.

The nature of the action on the case, elsewhere described (*v*), indicates sufficiently the proper parties to sue in this form of action.

Trover.

As possession is the fact which determines who should be the plaintiff in an action of trespass, so the right of pro-

(*q*) See Com. Dig. "Trespass;" *Jones* v. *Chapman*, 2 Exch. 803; *Ryan* v. *Clarke*, 14 Q. B. 65; *Randall* v. *Stevens*, 2 E. & B. 641; *Cox* v. *Glue*, 5 C. B. 533; *Holmes* v. *Wilson*, 10 Ad. & E. 503.

(*r*) See as to the doctrine of relation in trespass, *Barnett* v. *Earl of Guildford*, 11 Exch. 19.

(*s*) *Smith* v. *Milles*, 1 T. R. 480; *Young* v. *Hichens*, 6 Q. B. 606; *Hurrell* v. *Ellis*, 2 C. B. 295; *Watson* v. *Macquire*, 5 C. B. 836; *White* v. *Morris*, 11 C. B. 1015; *Brown* v. *Notley*, 3 Exch. 219.

(*t*) *Williams* v. *Millington*, 1 H. Bl. 81, 84; *Robinson* v. *Rutter*, 24 L. J., Q. B., 250.

(*u*) *Davis* v. *Danks*, 3 Exch. 435. As to who should sue for timber severed, see *Ward* v. *Andrews*, 2 Chit. 636; *Channon* v. *Patch*, 5 B. & C. 897; 1 Wms. Saund. 322 d, n. (5); *Rolls* v. *Rock*, cited 2 Selw. N. P., 10th edit., p. 1314.

(*v*) Ante, p. 125.

perty, absolute or special (*x*), coupled with the right of possession, resolves the same question in trover (*y*). And, indeed, mere possession, as against a wrongdoer, gives the right to maintain trover. Hence, both bailor and bailee of a chattel bailed during pleasure may maintain trover for its wrongful conversion (*z*). And again, a general or special property, conjoined with the immediate right to possession as against another who is in possession, will suffice to support an action of detinue (*a*).

Joinder of plaintiffs.

With respect to the joinder of parties as plaintiffs, it may be laid down: 1. That, where the legal interest affected by a tortious act is joint, they whose joint interest is affected thereby must join in suing for compensation in respect of the injury so occasioned (*b*). 2. That where several persons who are severally interested sustain a joint damage, they may sue either separately or jointly—in respect of it (*b*). 3. That where the interest and damage are several, there must be separate actions (*c*) brought by the persons injured in respect of their several injuries.

(*x*) 2 Wms. Saund. 47 b, d, e, f; per Lord *Loughborough*, C. J., 1 H. Bl. 85.

(*y*) *Watson* v. *Macquire*, 5 C. B. 836; *Owen* v. *Knight*, 4 Bing. N. C. 54; *Mason* v. *Farnell*, 12 M. & W. 683; *Franklin* v. *Neate*, 13 M. & W. 481; *Fenn* v. *Bittleston*, 7 Exch. 152; *Northam* v. *Bowden*, 24 L. J., Exch., 237; *S. C.*, 11 Exch. 70.

(*z*) *Smith* v. *Sleap*, 12 M. & W. 585, 589; *Armory* v. *Delamirie*, 1 Smith L. C. 151, and note thereto; *Sutton* v. *Buck*, 2 Taunt. 302; *Manders* v. *Williams*, 4 Exch. 339; per Lord *Ellenborough*, C. J., in *Martini* v. *Coles*, 1 M. & S. 147.

(*a*) *Steadman* v. *Hockley*, 15 M. & W. 553; *Foster* v. *Crabb*, 12 C. B. 136; *Crossfield* v. *Such*, 8 Exch. 825; and see ante, p. 121, where detinue has been considered as an action *ex contractu*.

(*b*) *Coryton* v. *Lithebye*, 2 Wms. Saund. 115, 116, n. (2); *Weller* v. *Baker*, 2 Wils. 423.

(*c*) Co. Litt. 145. b.; 2 Wms. Saund. 117 a; *Le Fanu* v. *Malcolmson*, 1 H. L. Cas. 637; *Robinson* v. *Marchant*, 7 Q. B. 919; *Williams* v. *Beaumont*, 10 Bing. 270; and cases cited 1 Broom's Prac. 551; and see *Forster* v. *Lawson*, 3 Bing. 452.

Effect of coverture as regards choice of plaintiffs ex delicto.

The husband must sue for all injuries to his own property—whether derived from his wife or not,—whenever such property has been reduced into his own possession. For property of the wife not so reduced, the wife may be joined as co-plaintiff: the true test whether she may be joined or not in any case being, whether the right of action would survive to her (*d*). In an action for a tort to the person of the wife, compensation may be sought either for the direct injury to the wife in respect of which a right of action would survive to her—and in this case the husband and wife must join—or for the consequential and special damage to the husband, in which case the husband must sue alone (*e*). In regard to the joinder of claims by husband and wife, the Common Law Procedure Act, 1852, s. 40, has effected a useful change in the law (*f*). It enacts, that "in any action brought by a man and his wife for an injury done to the wife, in respect of which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right, and separate actions brought in respect of such claims may be consolidated, if the Court or a judge shall think fit: Provided that in the case of the death of either plaintiff such suit, so far only as relates to the causes of action, if any, which do not survive, shall abate."

If the wife survive her husband she may in general sue for injuries done to her person or property either before or during coverture (*g*): and he may elect to join her with him in certain cases, as in trespass to land held in her right, or

(*d*) *Ayling* v. *Whicher*, 6 Ad. & E. 259.

(*e*) *Saville* v. *Sweeny*, 4 B. & Ad. 523; *Dengate* v. *Gardiner*, 4 M. & W. 7; *Guy* v. *Livesey*, Cro. Jac. 501; *Norris* v. *Seed*, 3 Exch. 782; *Longmeid* v. *Holliday*, 6 Exch. 761.

(*f*) As to former law on this subject, see 1 Chit. Pl., 7th edit., pp. 82 et seq.

(*g*) See *Waller* v. *Drakeford*, 1 E. & B. 749.

for obstructing a right of way to land leased to the wife *dum sola*, or generally when the wife is the meritorious cause of action (*h*), or had a vested interest directly affected by the tortious act (*i*). But both the husband and wife must sue jointly for torts to the personal property of the wife which had both their inception and consummation before marriage (*k*). And so where the wife has been slandered by words actionable in themselves, the wife must be joined: but when the action lies only by virtue of special damage to the husband, the wife cannot join, unless where the recent statutory provision cited at p. 155 applies (*l*). Further, where the wife has a right of action in autre droit, she must be joined as co-plaintiff (*m*).

Executors and administrators.

The right of personal representatives to sue in tort is given and regulated by the statute law (*n*). By the 4 Edw. 3, c. 7, reciting, that "in times past executors have not had actions for a trespass done to their testators, as of the goods and chattels of the same testators carried away in their lifetime," it is enacted, "that the executors in such cases shall have an action against the trespassers," in like manner as they whose executors they are should have had if they were living. An administrator is within the equity of this statute, and by stat. 25 Edw. 3, st. 5, c. 5, the like remedy is extended to the executors of executors.

(*h*) *Newton* v. *Boodle*, 9 Q. B. 984.

(*i*) *Weller* v. *Baker*, 2 Wils. 414; and see *Huggins* v. *Durham*, 2 Str. 726.

(*k*) *Milner* v. *Milnes*, 3 T. R. 627.

(*l*) *Grove* v. *Hart*, cited 4 B. & Ad. 520--1.

(*m*) *Serres* v. *Dodd*, 2 N. R. 407.

(*n*) 1 Wms. Saund. 216 a; *Le Mason* v. *Dixon*, Sir W. Jones, 174; *Raymond* v. *Fitch*, 2 Cr. M. & R 588; *Palgrave* v. *Windham*, 1 Str. 212; *Bunbury* v. *Hewson*, 3 Exch. 558; *Morgan* v. *Thomas*, 8 Exch. 302; *Welchman* v. *Sturgis*, 13 Q B. 552; *Yorston* v. *Fether*, 14 M. & W. 854; *Barnett* v. *Earl of Guildford*, 11 Exch. 19, and cases cited post, 617, n. (*t*).

Again, the 3 & 4 Will. 4, c. 42, provides, upon certain conditions, a remedy by the executors or administrators for injuries done to the real estate of any deceased person committed in his lifetime (*o*). But the most important modification of the maxim *actio personalis moritur cum persond* (*p*) has been effected by the 9 & 10 Vict. c. 93, which was enacted with a view of compensating the families of persons killed by accident, and which the reader will find commented on hereafter (*q*).

Bankruptcy and insolvency.

The effect of bankruptcy and insolvency upon the right to sue in actions ex delicto is, that whilst the assignees of the bankrupt or insolvent must be plaintiffs in respect of injuries committed to his estate, by which the amount of the fund belonging to his creditors is lessened (*r*), yet when the injury complained of is to his person (*s*), feelings, or reputation (*t*), the right to sue remains still vested in him. "Actions for injuries to personal chattels, whereby they are directly affected, and are prevented from coming to the hands of the assignee, or come diminished in value, undoubtedly pass. The action of trover for a conversion before the bankruptcy is a familiar instance of this. On the other hand, rights of action for injuries to the person or reputation, or the possession of real estate, do not pass" (*u*).

(*o*) Sect. 2.

(*p*) *Raymond* v. *Fitch*, 2 Cr. M. & R. 597; *Ricketts* v. *Weaver*, 12 M. & W. 723; and Leg. Max., 2nd edit., p. 702.

(*q*) Pages 715—717.

(*r*) *Hancock* v. *Caffyn*, 8 Bing. 358.

(*s*) *Howard* v. *Crowther*, 8 M. & W. 603.

(*t*) *Benson* v. *Flower*, Sir W. Jones, 215.

(*u*) *Beckham* v. *Drake*, 2 H. L. Cas. 626; 11 M. & W. 315; and see post, p. 582, and cases there cited.

As to chattels acquired after bankruptcy and before certificate, see *Fowler* v. *Down*, 1 B. & P. 44, 48; *Webb* v. *Fox*, 7 T. R. 391, 398; *Fyson* v. *Chambers*, 9 M. & W. 460; *Herbert* v. *Sayer*, 5 Q. B. 982.

The assignee of an insolvent debtor has vested in him all the estate and rights of the insolvent from the date of the vesting order, and can therefore recover in trover, though the conversion took place whilst the provisional assignee still held his appointment (*x*).

Defendants ex delicto.

The most general rule for choosing the defendant in an action *ex delicto* is—that the party committing the tortious act (*y*), or asserting a right or title adverse to the plaintiff's, should be made defendant. A familiar instance illustrating this rule is, that when the owner of land erects on it a nuisance and then demises the land for a term, he will be liable for the erection of the nuisance in the first instance, though either lessor or lessee would be liable for its continuance—and the demise being held to operate as an affirmance of the nuisance (*z*) every successive occupier will equally be liable for the continuance of it.

Joinder of defendants in tort.

With respect also to the joinder of defendants in an action ex delicto, it may be laid down that all who are concerned in committing the tort complained of, are liable to be jointly sued in respect of it (*a*).

Joinder of

In regard to the joinder of husband and wife in actions

(*x*) *Yorke* v. *Brown*, 10 M. & W. 78.

(*y*) See post, Book III. Chaps. 1—4.

(*z*) *Rosewell* v. *Prior*, 2 Salk. 460; *Rich* v. *Basterfield*, 4 C. B. 801; *Russell* v. *Briant*, 8 C. B. 836; *Holmes* v. *Wilson*, 10 Ad. & E. 503; *Brent* v. *Haddon*, Cro. Jac. 555; *Thompson* v. *Gibson*, 7 M. & W. 456.

(*a*) Per *Tindal*, C. J., *Cranch* v. *White*, 1 Bing. N. C. 418; *Laugher* v. *Pointer*, 5 B. & C. 553; *Sedman* v. *Walker*, 1 Exch. 589. See 2 Wms. Saund. 117. Further, as to one partner involving his copartners, so as to render them liable to be sued with him, see *Petrie* v. *Lamont*, Car. & M. 93; and with respect to the liability of a corporation for the act of its agent, see *Smith* v. *The Birmingham Gas Co.*, 1 Ad. & E. 526; and *Eastern Counties R. C.* v. *Broom*, 6 Exch. 314; see, also, post, p. 683.

ex delicto, it will suffice to state that they must be joined in any action of this class when founded on a tort committed by the wife whilst sole—as in trover where both the finding and conversion were before marriage,—or for a tort committed by the wife during coverture—as for an assault or slander by her, even when she is living separately from her husband (*b*). In respect of a joint battery by husband and wife they may be both sued in one action (*c*). In some other cases, where the relationship of coverture exists, the husband alone is the party proper to be sued in an action of tort.

husband and wife as defendants.

The 3 & 4 Will. 4, c. 42, s. 2, regulates in some important particulars (*d*) actions against executors and administrators. It recites that there had been no remedy provided by law for certain wrongs done by a person deceased in his lifetime to another in respect of his property real or personal—and it then proceeds to enact "that an action of trespass or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased, for any wrong committed by him in his lifetime to another in respect of his property real or personal, so as such injury shall have been committed within six calendar

Executors and administrators.

(*b*) Com. Dig. Bar. & Feme, Y. For slander spoken by husband and wife, there must be separate actions, the one against the husband and wife, the other against the husband only: see *Swithin* v. *Vincent*, 2 Wils. 227. *The Liverpool Adelphi Loan Ass.* v. *Fairhurst*, 9 Exch. 422, cited post, p. 600, is an important case regarding the liability of the husband in respect of a false representation by the wife.

(*c*) See *Vine* v. *Saunders*, 4 Bing. N. C. 96.

(*d*) See as to the liability ex delicto of personal representatives generally, *Hambly* v. *Trott*, 1 Cowp. 373, 375, recognised 7 Ad. & E. 429; Per Lord *Kenyon*, C. J., 3 T. R. 549; Com. Dig. "Administration," (B. 15).

months before such person's death (*e*), and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person, and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person" (*f*). Thus, for a tort to the property of another, whether real or personal, a remedy in trespass, trover (*g*), or case may now be enforced against the personal representatives of the party originally liable.

But neither the above Act nor the 9 & 10 Vict. c. 93, the provisions of which are hereafter considered at some length (*h*), will supply any remedy against the representatives of one deceased who has committed a tort to the person of another, whether death has or has not thence resulted.

Bankrupts. Lastly, the certificate of a bankrupt is no bar to an action against him for a tort committed by him prior to his certificate (*i*). His assignees, however, are liable for any torts committed by them in their official capacity—though the 12 & 13 Vict. c. 106 (*k*), annexes conditions to their being sued with respect to any act of theirs done *in pursuance of* the Statute (*l*).

(*e*) *Richmond* v. *Nicholson*, 8 Scott, 134.

(*f*) See *Powell* v. *Rees*, 7 Ad. & E. 426.

(*g*) *Ward* v. *Audland*, 16 M. & W. 862; *Le Mason* v. *Dixon*, Sir W. Jones, 173, 174; and authorities cited supra, n. (*d*).

(*h*) Post, p. 715.

(*i*) *Lloyd* v. *Peell*, 3 B. & Ald. 408; *Wilmer* v. *White*, 6 Bing. 291; *Doe* d. *Davies* v. *Thomas*, 6 Exch. 854.

(*k*) Sects. 159—234. See *Ouchterlony* v. *Gibson*, 1 D. & L. 1.

(*l*) As to actions against messengers in bankruptcy, see sects. 106, 107, and 108 of the statute; *Munday* v. *Stubbs*, 10 C. B. 432.

2. *Proceedings from Writ to Appearance.*

Introductory remarks.

Before entering upon any inquiry as to the practice of our superior Courts of common law, it seems reasonable to ask upon what basis it is founded, and by what authority constituted ;—we shall find that in its present shape it dates from a very recent period, and that the Common Law Procedure Acts of 1852 and 1854, and the General Rules of Hilary Term, 1853, and of Michaelmas Vacation, 1854, contain the materials upon which it mainly rests; although there are, besides these, certain statutes unrepealed, which regulate special matters of practice.

The Procedure Act of 1852 was enacted with a view to rendering the process, practice, and mode of pleading in the superior Courts of common law "more simple and speedy" (*m*). The Act of 1854 had the twofold object of still further amending the practice of these Courts and of enlarging their jurisdiction (*n*). The rules of Hilary Term, 1853 (*o*) are prefaced by an order of the Judges, that all the then existing written (*p*) rules of practice in regard to civil actions should be annulled. It will be found, however, that many of these rules have been re-enacted in the same language; so that we shall derive frequent assistance in our interpretation of the code now in force, by reference to earlier decisions of

(*m*) See preamble of 15 & 16 Vict. c. 76.

(*n*) See title of 17 & 18 Vict. c. 125.

(*o*) There are two sets of rules of Hil. T, 1853, viz the Practice and the Pleading Rules; the latter did not come into force until Trin. T., 1853; many of the former are identical with those which were previously in force.

(*p*) Unwritten rules of practice remain in force, so far as they are not inconsistent with the rules recently promulgated. *Begg* v. *Forbes*, 13 C. B. 614.

the Courts (*q*), and the principles laid down by them in analogous cases. Courts of law have always within themselves the inherent power and right to regulate their own practice, or, as *Alderson*, B., has observed (*r*), every Court "must necessarily be entrusted with control over its own rules of practice;" a remark as applicable to inferior as to superior Courts.

The writ of summons.

The first step to be taken in an action at law, is that of summoning the party against whom the action is to be brought into the Court in which it is intended to be carried on. Now this is effected in personal actions by that particular kind of process which is termed a *writ of summons* (*s*). The forms of this writ (which may be obtained in blank at any law stationer's) are given in the schedule (A) to the Common Law Procedure Act, 1852, and will be found to be adapted to the three following cases:—1st, where the defendant resides within the jurisdiction of the Court; 2ndly, where, being a British subject, he resides out of the jurisdiction; and, 3rdly, where, *not* being a British subject, he resides out of such jurisdiction (*t*).

It will be convenient, in the first instance, to consider the mode of procedure in the more usual case, viz. where the defendant is *resident within the jurisdiction* of the Court. Here the writ (which is addressed to the defend-

(*q*) Per *Tindal*, C J., *Scales* v. *Cheese*, 12 M & W. 687; *Mellish* v. *Richardson*, 1 Cl. & F. 235; *Jackson* v. *Galloway*, 1 C. B. 280; Per Lord *Wynford*, *Ferrier* v. *Howden*, 4 Cl. & F. 32. See *Fleming* v. *Dunlop*, 7 Cl. & F. 43.

(*r*) *Ex parte Story*, 8 Exch. 199.

(*s*) See 15 & 16 Vict. c. 76, ss. 2—25; *R.* v. *The Saddlers' Co.*, 1 B. C. Ca. 183.

(*t*) As to the writ of summons—against a trader having privilege of Parliament, see 12 & 13 Vict. c. 106, s. 77,—under the Succession Duties Act (16 & 17 Vict. c. 51), see 9 Exch. 286.

ant (*u*)) commands him to cause an appearance to be entered for him in the action within eight days after service of the writ upon him, inclusive of the day of service, and gives notice that, in default of such appearance being entered, the plaintiff may proceed to judgment and execution in the action. To the writ is subscribed a memorandum as to the period within which it must be served, and upon it are certain indorsements which will presently be described.

Without attempting to enter into an examination of the very numerous cases decided under the former practice, with reference to irregularities (*v*) connected with the writ of summons, attention may with advantage be directed to the following point relating to this subject: A difficulty may sometimes be felt as to the mode of describing a defendant, where he has successively resided at different places. Under such circumstances, he ought to be described as of his last known or supposed place of residence; for, as observed by Mr. Justice *Coleridge*, in *Downes* v. *Garbett* (*x*), with reference to words (*y*) identical with those used in the 2nd section of the Common Law Procedure Act, "The Act (*y*) evidently refers to two states of facts, 1. Where the defendant's residence or supposed residence is known, and he is known or supposed to be residing

(*u*) If there are more defendants than one, all their names should be comprised in the writ: C. L. Proc. Act, 1852, s. 4; Per *Parke*, B., *Christie* v. *Bell*, 16 M. & W. 669; *Brown* v. *Fullerton*, 13 M. & W. 556; *Goodchild* v. *Leadham*, 1 Exch. 706; *Caldwell* v. *Blake*, 2 Cr. M. & R 249; *Pepper* v. *Whalley*, 1 Bing. N C. 71.

(*v*) *Ross* v. *Gandell*, 7 C. B. 766. See, for instance, with respect to mistake in date, *Kirk* v. *Dolby*, 6 M & W. 636, and cases there cited.

See the cases cited n. (*u*) supra. As to misnomer in an action, see *Williams* v. *Bryant*, 5 M. & W. 447; *Cantwell* v. *Earl of Stirling*, 8 Bing. 174.

(*x*) 2 D. & L. 944; *Pilbrow* v. *Pilbrow's At. R. C.*, 4 D. & L. 450.

(*y*) 2 Will. 4, c. 39, s. 1.

there. 2. Where he has left his place of residence, and is known or supposed to be in some other place." The description of the defendant's residence, however, whether actual or supposed, ought to be correctly stated in the writ; and there is a manifest difference to be noted between the correct description of a supposed residence and the incorrect description of an actual residence, for the latter might be ground for requiring an amendment of the writ, whereas the former would be in truth a compliance with the requirements of the statute (*z*).

Indorsements on writ.

The common indorsements upon the writ are prescribed by the 6th and 8th sections of the Act of 1852, the former of which directs that the writ shall be indorsed with the name and place of abode of the attorney who sues it out (*a*) (if an attorney be employed), or with the address of the plaintiff if it be sued out by him in person. The object in requiring this indorsement is, that the defendant may know whither he may go, with a view to settling the action (*b*). The 7th section further provides a mode of compelling an attorney who sues out a writ, to declare whether it was issued by his authority (*c*), and to give the name and abode of his client; and if it appears that the attorney had not authorised the issuing of the writ, a stay of proceedings may be obtained. The 8th section requires, that in all actions which are brought for payment of any debt (*d*), the amount of debt and costs shall be stated on the writ. The object of this (which is called the *common* indorsement) is sufficiently explained in its concluding words, which in-

Common indorsement.

(*z*) *King* v. *Hopkins*, 2 D. & L. 638.

(*a*) *Youlton* v. *Hall*, 4 M. & W. 582; *Lloyd* v. *Jones*, 1 M. & W. 549; *Toby* v. *Hancock*, 4 D. & L. 385.

(*b*) *Dawes* v. *Solomonson*, 6 Scott, 590.

(*c*) *Johnson* v. *Birley*, 5 B. & Ald. 543; *Smith* v. *Bond*, 11 M. & W. 326.

(*d*) *Perry* v. *Patchett*, 2 Dowl. 667; *Hobbs* v. *Young*, 2 D. & L. 474; *Harris* v. *Holler*, 7 D. & L. 319.

form the defendant, that, "if the amount demanded by the indorsement be paid to the plaintiff or his attorney within four days from service of the writ, further proceedings will be stayed." It may, however, be proper to add that the plaintiff will not (if the defendant allows the action to proceed) be precluded by his indorsement from recovering at the trial an amount exceeding what is specified therein, though he ought to indorse upon his writ the sum really claimed to be due, because the defendant might otherwise be misled, or even prevented from settling the action (*e*). Cases of course constantly occur in practice, in which the plaintiff seeks to recover interest upon his debt, as well as the debt itself; and if so, he must either indorse upon his writ the amount claimed in respect of interest, or he must state the date from which he claims it (*f*).

Special indorsement.

That particular species of indorsement upon the writ of summons, which is called a *special* indorsement, can only be made in certain cases, viz. when the defendant is resident within the jurisdiction of the Court (*g*), and the claim happens to be for "a debt or liquidated demand (*h*) in money, with or without interest, arising upon a contract express or implied," as on a bill of exchange, promissory note, or cheque, or other simple contract debt, or on a bond, &c. Under these circumstances, the plaintiff will be at liberty to make, upon the writ and copy, a 'special indorsement' of the particulars (*i*) of his claim, in a form given in

(*e*) *Elliston* v. *Robinson*, 2 Cr. & M. 343.

(*f*) *Chapman* v. *Becke*, 3 D. & L. 350; *Bardell* v. *Miller*, 7 C. B. 753; *Jacquot* v. *Boura*, 5 M. & W. 155; *Hodding* v. *Stuchfield*, 2 D. & L. 597; *Allen* v. *Bussey*, 4 D. & L. 430.

(*g*) Sect. 25.

(*h*) *Green* v. *Bicknell*, 8 Ad. & E. 715; *Jacquot* v. *Boura*, 7 Dowl. 331; *Hall* v. *Scotson*, 9 Exch. 238; *Rogers* v. *Hunt*, 10 Exch. 474; Reg. Gen., H. T., 1853, rules 19—21.

(*i*) *Fromant* v. *Ashley*, 1 E. & B. 723; *Warrington* v. *Leake*, Exch., Trin. T., 1855.

the schedule to the Act. The advantage of making this special indorsement is this, the plaintiff may, if the defendant make default in appearing to the writ, sign final judgment against him (*k*) for any sum not exceeding that indorsed on the writ, together with interest (*l*) to the date of the judgment, and a certain sum for costs (*m*). Though, even in this case, the defendant may be let in to defend, on producing satisfactory affidavits to account for his non-appearance, and disclosing a defence upon the merits (*n*). The special indorsement upon the writ will dispense with the necessity of giving particulars of demand (*o*), unless indeed they be expressly ordered by a Judge. The special indorsement will not however dispense with the ordinary indorsement, which must always be made under the 8th section of the Act, where the claim is for "any debt."

Writ to be sealed.

When the writ of summons has been duly prepared (in accordance with what has been already said) by the plaintiff or his attorney, it must be taken to the Writ Office of the Court in which the action is brought to be authenticated by the seal of the Court, and the attorney must then deliver to the officer a memorandum, called a *præcipe*, which contains the names of the parties to the action, the name of the attorney issuing the writ, and the date. This memorandum is filed by the officer and may be of use (in case of a fraudulent alteration of the date of the writ)—as shewing the precise day on which it really issued and on which therefore the action was commenced (*p*).

Præcipe.

Service of writ.

When the writ has been thus sealed or stamped—it must

(*k*) *Rowberry* v. *Morgan*, 9 Exch. 730.

(*l*) *Rodway* v. *Lucas*, 10 Exch 667; *Rogers* v. *Hunt*, 10 Exch. 474.

(*m*) Sect. 27.

(*n*) Sect. 27 ad fin.

(*o*) As to which see post, p. 189.

(*p*) See sect. 5.

be *served* upon the defendant or defendants in the action, unless where the defendant's attorney undertakes to appear for him; for such undertaking, which may be enforced against the attorney by a summary application to the Court or a Judge, will dispense with the necessity of personally serving the writ.

It is worthy of remark, that service of the writ is required on grounds of natural justice—which demands that every man shall have notice of legal proceedings instituted against him, in order that he may defend himself accordingly—this proposition, which scarcely needs authority to support it, may be illustrated by cases where it has been held to be a sufficient answer to an action upon a foreign judgment in our Courts, that notice of the proceedings abroad was not duly given to the defendant. Thus, in *Ferguson* v. *Mahon* (*q*), to an action on a judgment obtained in the Court of Common Pleas in Ireland, the defendant pleaded that he had never been arrested upon, or served with, nor at any time had notice of any process of the Court at the plaintiff's suit for the cause of action on which the judgment was obtained, and that he (the defendant) had never appeared to the action; and this plea was held good, because, said Lord *Denman*, C. J., "when it appears as here that the defendant has never had notice of the proceeding or been before the Court, it is impossible for us to allow the judgment to be made the foundation of an action in this country."

Mode of service.

Service, then, of the writ of summons being clearly essential, it becomes necessary to consider *how* it must be served. Service is generally effected by delivering a

(*q*) 11 Ad. & E. 179; Story Confl. Laws, 3rd edit., p. 1003. See *Meeus* v. *Thellusson*, 8 Exch. 638.

copy of the writ to the defendant *personally*, and at the same time shewing him the original, if demanded. With a view moreover to facilitating service of the writ where there are several defendants resident in different parts of the country, or where there is a single defendant whose precise residence is not known, it is now competent to a plaintiff (under the 9th section of the first Procedure Act) to issue '*concurrent*' writs at any time whilst the original writ is in force, such writs being stamped with the word 'concurrent' and duly dated, and thus to effect service on the defendants or defendant without unnecessary delay.

Concurrent writs.

Personal service.

Although, as just remarked, service of the writ of summons must, when practicable, be *personal*, yet the word personal used in the 17th section of the Act must not be understood in too strict a sense, because various cases decided under the old practice shew that a service may be considered 'personal' where the writ is not left in or put into the actual corporal possession of the defendant (*q*).

It is of course necessary that care be taken to serve the proper party with the writ; and how obvious soever may be the truth of this remark, some curious cases are to be found in the books, where questions of difficulty have arisen in consequence of the wrong party having been served. Let us consider what course should be adopted by an individual thus mistakenly served with a writ of summons. In the first place it is clear, that, if the cause proceed to trial, he will have a good defence upon the merits (*r*); but,

(*q*) *Thompson* v. *Pheney*, 1 Dowl. 441; and see per *Wightman*, J., in *Heath* v. *White*, 2 D. & L. 40; *Goggs* v. *Lord Huntingtower*, 1 D. & L. 599; *Christmas* v. *Eicke*, 6 D. & L. 156; *Walton* v. *Univ. Salv. Co.*, 16 M. & W. 438; *Sheehy* v. *The Prof. Life Ass. Co.*, 13 C. B. 787.

As to service on lunatics, see *Holmes* v. *Service*, 15 C. B. 293.

(*r*) *Griffin* v. *Gray*, 5 Dowl. 331.

should the plaintiff persevere, either through obstinacy or ignorance, in the action, it is undeniable that much inconvenience and some pecuniary loss may thus be entailed upon the defendant (*s*). In the case supposed, however, the defendant certainly would not be well advised to disregard altogether the service of the writ, and to take no notice of the subsequent proceedings (if any) in the action; for, as remarked in *Stevenson* v. *Thorne* (*t*), a defendant is not the less liable upon a judgment because he has been sued throughout by a wrong name. He ought, then, at once to inform the plaintiff of his mistake, in order that the proceedings erroneously instituted against him may be discontinued. But if, instead of adopting this straightforward course, the defendant act as if he were really the individual intended to be sued, and thus lure on the plaintiff with the motive of making him pay costs, the trick will probably be defeated by some interlocutory application to the Court during the progress of the cause, and, if detected, the defendant will infallibly be visited with such pecuniary punishment in the shape of costs as may be thought to meet the justice of the case (*u*).

Another case sometimes occurring in practice is where proceedings are had, and judgment is obtained, against a party who has not been served with the writ. This occasionally happens by reason of an attorney appearing for an individual without authority from him; and in this case the Court will, on motion, acting in accordance with the principle of natural justice already adverted to, set aside the

(*s*) See *Davies* v. *Jenkins*, 11 M. & W. 745; cited ante, p. 78.

(*t*) 13 M. & W. 149.

(*u*) *Walker* v. *Medland*, 1 D. & L. 159; *Goodered* v. *Belcher*, 4 C. B. 472; *Richards* v. *Hanley*, 10 Jur. 1057, Q. B.

judgment and appearance with costs, and leave the plaintiff to recover them (if he can) from the delinquent attorney by summary application to the Court (*x*).

Evading personal service.

Again—it not unfrequently happens, that a defendant, knowing that a writ has been issued against him, evades service of it. Under these circumstances, the 17th section of the first Procedure Act has provided the course which ought to be adopted. The words there used are, that in case it shall appear to the Court or Judge "that reasonable (*y*) efforts have been made to effect personal service, and either that the writ has come to the knowledge of the defendant, or that he wilfully evades service of the same, and has not appeared thereto," the Court or Judge may order that the plaintiff be at liberty to proceed as if personal service had been effected, subject to such conditions as may seem fit. The object of this section is to provide an efficient substitute for the former clumsy and oppressive method of compelling an appearance by *distringas* (*z*).

Absconding debtor.

There are certain statutory provisions, which have also in modern times been made to protect a creditor, when compelled to sue for recovery of his debt or for damages to the amount of 20*l.* or upwards, and where there is reason to believe that his debtor is about to quit the country. The creditor has, under 1 & 2 Vict. c. 110, subject to certain restrictions, a right to arrest his debtor on mesne process, or he may

(*x*) *Bailey* v. *Buckland*, 1 Exch. 1, 7; *Hubbart* v. *Phillips*, 13 M. & W. 702.

(*y*) *Gorringe* v. *Terrewest*, 2 L. M. & P. 12; and cases in Chitty's Archb., 8th edit., vol. 1, p. 173; *Barringer* v. *Handley*, 12 C. B. 720; *Wakeley* v. *Teesdale*, 2 L. M. & P. 85.

(*z*) See per *Jervis*, C. J., *Barringer* v. *Handley*, 12 C. B. 720; Com. L. Com., 1st Rep. p. 4, where the now obsolete mode of procedure by distringas to compel an appearance is briefly explained.

have recourse to the peculiar powers conferred upon him by the Absconding Debtors Arrest Act (*a*). It must be observed, that, if these proceedings are taken, still a writ of summons must have been issued, though it need not necessarily be served before the writ of capias (upon which the debtor is to be arrested) can be obtained (*b*). I may add, too, that the duty of the sheriff in executing the writ of capias on mesne process was much considered in the case of *Howden* v. *Standish* (*c*), which shews "that the sheriff is bound at his peril to provide such a force as will enable him to effect" a caption of the defendant, "in spite of any resistance which he has reason to anticipate." This case illustrates the very stringent nature of the obligation cast by law upon the sheriff of executing the King's writ.

By the first Procedure Act important and beneficial changes have been effected, both as regards the place where and the time within which the writ of summons may under ordinary circumstances be served. Formerly, the writ could only be served in the county specified therein, or within 200 yards of its boundary; now it may be served anywhere within the jurisdiction of the Court. Formerly, the period of duration or continuance of the writ was four calendar months; now it is in force for six months (*d*). And although, prior to the late Act, the writ of summons could have been continued by what were called *alias* and *pluries*

Duration and renewal of writ.

(*a*) 14 & 15 Vict. c. 52, s. 1; *Masters* v. *Johnson*, 8 Exch. 63; *Eld* v. *Vero*, 8 Exch. 655.

(*b*) See as to the writ of capias on mesne process, *Copeland* v. *Child*, 1 B. C. Ca. 176; Bagl. Pr. 340 et seq., where the reader will find a brief statement of the practice under 1 & 2 Vict. c. 110; *Gadsden* v. *M'Lean*, 9 C. B. 283; *Cunliffe* v. *Maltass*, 7 C. B. 695.

(*c*) 6 C. B. 521.

(*d*) *Black* v. *Green*, 15 C. B. 264.

writs (*e*), a new and better mode of renewing the writ is now in force, viz. by a stamp upon the writ itself, "bearing the date of the day, and month, and year of its renewal" (*f*). If, moreover, a concurrent (*g*) writ be issued, it may likewise be renewed in the same way. By the express words of the Act, "a writ of summons so renewed shall remain in force and be available to prevent the operation of any Statute of Limitations, and for all other purposes, from the date of the issuing of the original writ." Under s. 13, the renewed writ will, on its production, be evidence of the commencement of the action as of its first date.

Indorsement of service. If service of the writ be effected, it is requisite that the *date of service* be specified in an indorsement on the writ within *three* days after such service (*h*).

Appearance. It will be seen, on looking at the writ of summons, that the immediate object of it is to cause the defendant to *appear* to the action, in order that the plaintiff may proceed therewith; and so essential to the prosecution of the suit was 'appearance' formerly deemed, that it was necessary for the plaintiff, upon affidavit of personal service of the writ, to enter an appearance for the defendant before he could proceed in the action; and this was called "an appearance according to the statute," viz. the 12 Geo. 1, c. 29, which first allowed it to be entered. The defendant ought, indeed, to appear within the eight days specified in the writ of summons; but if he omits to do so, the plaintiff is no longer obliged to enter an appearance for him, but may, on filing an affidavit of personal service of the writ,

(*e*) As to which see Broom's Pract., vol. 1, p. 659.

(*f*) Sect. 11.

(*g*) See sect. 9.

(*h*) Sect. 15; *Wakeley* v. *Teesdale*, 2 L. M. & P. 85.

proceed as if the defendant had appeared. This may be done under the 28th sect. of the first Procedure Act, which also makes apparent the disadvantage entailed on a plaintiff (*i*) who has omitted to indorse his writ specially, when under the 25th section he might have done so, inasmuch as it provides that the plaintiff shall not in such case be entitled to more costs than if he had made such special indorsement and signed judgment upon non-appearance. A defendant may, however, be let in to defend after judgment by default has been signed upon a specially indorsed writ, if he "disclose" a satisfactory defence to the action (*k*).

How to be entered.

The practical mode of entering an appearance to the action is prescribed by the 31st and 30th sections of the statute; it is by delivery of a memorandum in a specified form to the proper officer. It may be well to remark, that, by the 29th section, an appearance may now be entered at any time before judgment, though a defendant appearing after the time appointed by the writ will not be entitled to any further time for pleading or taking any other necessary proceeding in the suit, than if he had appeared within the appointed time.

The result of what has been thus far said is, that, where a defendant is resident within the jurisdiction of the Court, a plaintiff may, in most cases, proceed to judgment against him; because, if the writ is personally served, he may then, on filing an affidavit of such service, sign judgment by default, or in some cases final judgment, under the 27th and 28th sections of the Act. If the defendant cannot be personally served, the plaintiff may then proceed in the

(*i*) *Rowberry* v. *Morgan*, 9 Exch. 730.

(*k*) Sect. 27; *Warrington* v. *Leake*, Exch. Trin. T., 1855.

manner pointed out by the 17th section (*l*). And cases cannot very often occur in practice where a serious difficulty will be experienced by a plaintiff, who acts bonâ fide, in providing an affidavit conformable to the requirements of that section.

Service of writ where defendant out of jurisdiction

Where the defendant is out of the jurisdiction of the Court, it is clear that the provisions of the Act above adverted to would not apply. Before the recent statute, the only mode of proceeding in this case (and that a very imperfect one) was by *distringas, with a view to outlawry*, which, as stated by the Common-Law Commissioners in their First Report (*m*), was "in theory a judgment pronounced for contumacy in neglecting to appear in one of the superior Courts to be amenable to proceedings there instituted." This proceeding to outlawry was peculiarly absurd and ineffective, because the party outlawed could, if desirous of setting aside or reversing the outlawry, do so at any time and without difficulty. It is now altogether abolished by the 24th section of the Act, and in lieu of it a writ may be issued and made available as a means for obtaining final judgment against a defendant, whether he be a British subject or foreigner, *resident* (*n*) out of the jurisdiction.

Writ where defendant is a British subject resident out of jurisdiction.

Where the defendant is a British subject, residing out of the jurisdiction, the plaintiff may now, under sect. 18, issue a writ in the form contained in the Schedule (A) to the Act, the distinguishing feature of which is, that the time allowed therein for appearance by defendant, instead of being

(*l*) See *Barringer* v. *Handley*, 12 C. B. 721; ante, p. 170.

(*m*) Page 5.

(*n*) On a defendant *casually* abroad, service of the ordinary writ of summons cannot properly be effected, ante, p. 171, see *Minet* v. *Round*, 1 L. M. & P. 654; nor will such writ (unless amended) be available against a defendant *resident* abroad; see *Hesketh* v. *Fleming*, 24 L. J., Q B. 255.

3. *Proceedings from Appearance to Notice of Trial. The Pleadings in the Action.*

So soon as the defendant has appeared, the regular pleadings in the action will commence, unless indeed the litigating parties choose to avail themselves of certain recent statutory provisions, which, when applicable, render written pleadings unnecessary. Under the Common Law Procedure Act, 1852 (*s*), if parties are agreed as to the question or questions of fact or law to be decided between them, they may—(after the writ has been issued)—by consent and order of a Judge (*t*), proceed to trial forthwith, upon a statement embodying the matters at issue between them. So also under the Procedure Act of 1854, power is given to the Court or Judge to decide "in a summary manner" matters of mere account which cannot conveniently be tried in the ordinary way, or to order a reference of the matter in dispute to an arbitrator appointed by the parties, or to an officer of the Superior Court in which the action has been brought, or, in country causes, to a Judge of a County Court (*t*).

Trial without Pleadings.

(*s*) Sects. 42—48.

See *Doe* d. *Duntze* v. *Duntze*, 6 C. B. 100.

(*t*) 17 & 18 Vict. c. 125, ss. 3—17.

There are seven species of trial enumerated and described by Blackstone as existing in his time (3 Com., p. 330), viz. 1, by record; 2, by inspection or examination; 3, by certificate; 4, by witnesses; 5, by wager of battle; 6, by wager of law; 7, by jury. The wager of battle was abolished by 59 Geo. 3, c. 46, and the wager of law by 3 & 4 Will. 4, c. 42. The trial by inspection, though not abolished by statute, never occurs in practice. The trial by record is applicable where nul tiel record has been pleaded; and the issue thereon is decided in favour of the plaintiff by production of the record in question before the Court on a certain day. Trial by certificate is very rarely resorted to. It is said to be "allowed in such cases where the evidence of the person certifying is the only proper criterion of the point in dispute,"

The more usual method, however, of raising questions in dispute for decision in the superior Courts, is by formal written pleadings made in alternate series by the plaintiff and defendant of their respective grounds of action and defence (*u*). The object of pleading is to ascertain by a process of elimination the matters really in controversy between the parties, thus avoiding all discussion and inquiry as to those facts and matters which are not disputed. The effect of this process is to simplify the subject-matter for the decision of the Judge or jury (whose provinces are totally distinct), and to save the parties unnecessary trouble and expense, which might otherwise be incurred in collecting evidence in support of facts which at the trial were found to be uncontested, to rebut claims which were not advanced, or to disprove allegations which were not made.

Object of pleading.

Mode of pleading.

Now to accomplish the object just indicated, the plaintiff is in the first place called upon to state the facts which constitute his cause of action. The defendant is then required to answer the claim put forth, and in so doing he must at his option adopt some one of the following courses: either he must deny the statement of the plaintiff; or, confessing it, must avoid the legal consequence flowing from it by asserting some fresh fact; or else, admitting the facts alleged, he must deny the legal effect ascribed to them by the plaintiff. Should the defendant rely upon some fresh fact adduced by him, the plaintiff will, of course, have to neutralise its effect, either by denying it, or by confessing

(3 Bla. Com. p. 333), as where the ordinary certifies on an issue raised by a plea of ne unques accouple en loyal matrimony in an action of dower. When the trial by witnesses (per testes) was permitted, (3 Bla. Com. p. 336), the issue of fact was left to the determination of the judge, without the intervention of a jury. See also 3 Steph. Com., 2nd edit., p. 561.

(*u*) C. L. Com., 1st Rep., p. 17.

and avoiding it, or by calling in question its operation in point of law. And in this manner the parties will alternately proceed "till it is ascertained that there is some fact asserted by the one side and denied by the other, or that there is some proposition of law affirmed on the one hand and denied on the other (*x*)." In either of which cases the particular series of pleadings which so terminates is said to be *brought to issue* (*y*), i. e., to be ripe for decision either by a jury or the Court.

It does indeed sometimes happen that the issue thus raised between the parties is immaterial, i. e. as explained by Serjeant Stephen in his Treatise on Pleading (*z*), that "the pleading is found on examination to have miscarried, and failed to effect its proper object—of raising an apt and material question between the parties." In such cases the Court will, according to circumstances, either direct a *repleader* (*a*) with a view to curing the particular defect, or will give such judgment as upon the facts disclosed by the pleadings may appear proper, or direct a trial de novo (*a*). Repleader.

In illustration of our system of pleading let us suppose (*b*) that the plaintiff complains in his declaration of an assault by the defendant. If the defendant in his plea denies the assault, an issue in fact is at once raised—if, admitting the fact of the assault, he pleads that he committed it in self-defence, here, nothing being as yet denied, no issue is raised between the parties, but, fresh matter being alleged, the plaintiff will be necessitated to reply to it. If in so doing

(*x*) C. L. Com., 1st Rep., p. 11.

(*y*) "Issue, *exitus*, a single, certain, and material point issuing out of the allegations or pleas of the plaintiff and defendant:" Co. Litt. 126. a.

(*z*) 5th edit., p. 108.

(*a*) See C. L. Proc. Act, 1852, s. 157; R. G. Pl., reg. 24; *Doogood* v. *Rose*, 9 C. B. 132; *Crossfield* v. *Morrison*, 7 C. B. 286.

(*b*) See C. L. Com., 1st Rep., pp. 11--12.

he denies the truth of the plea, the parties will be at issue; but, instead of taking this course, he may admit the plea to be true, and say that he assaulted the defendant to prevent his own goods and chattels from being taken away by him; and to this the defendant might rejoin by a denial, or by saying that the goods were on his (defendant's) land and that he was in the course of removing them,—to which the plaintiff might answer, that he had the leave and license of the defendant for putting them on his land. We have now reached, in pursuing the alternations of the pleading, that stage, rather unusual in practice, denominated the rebutter (*c*), and it will be evident that when the various matters put forward by way of defence or explanation on either side respectively are exhausted, one party will at length be compelled to deny the preceding statement of the other, and so an issue will be raised; or else one of the parties will be constrained, admitting the truth of such antecedent statement, to deny its legal sufficiency as an answer, and in this case also the parties will be brought to issue.

In point of fact, it very frequently and indeed most usually happens, that, instead of one series or succession of pleadings between litigating parties arising out of one particular transaction, there are several such series; and it is also true, that, by an important provision of the first Common Law Procedure Act, issues as well of fact as of law may be educed from one particular count or from one ma-

(*c*) The different steps in pleading after declaration are respectively designated the plea, replication, rejoinder, surrejoinder, rebutter, surrebutter, beyond which, in modern times at least, the pleadings are hardly known to extend. There is an instance of pleading to surrejoinder in *Taplin* v. *Florence*, 10 C. B. 44; and to rebutter in *Sheehy* v. *The Professional Life Assurance Co.*, 13 C. B. 787.

terial averment in the declaration (*d*); but still the example just given will suffice to shew that there must in every case be eventually certain definite questions evolved between the parties, upon the decision and settlement whereof will depend the success or failure of the plaintiff (*e*).

"Special pleading considered in its principle," as observed in one of the Reports of the former Common Law Commissioners, "is a valuable forensic invention, peculiar to the common law of England, by effect of which the precise point in controversy between the parties is developed and presented in a shape fit for decision" (*f*). If that point is found to consist of matter of fact, the parties are thus apprised of the exact nature of the question to

(*d*) See post, p. 191.

(*e*) An examination of the Year Books is recommended to any one inclined to investigate the comparative advantages of *oral* and *written* pleading. The earliest reports of oral pleadings are contained in the first volume of the Year Books, and date from the reign of Edward II. (see Steph. Pl. 23—25; 2 Reeves' Hist. Eng. L. pp. 344—349).

In the First Report of the present Com. Law Commissioners, pp. 19, 20, the reader will find that the mischievous technicalities and useless subtleties, which deformed the science of pleading at different times, are ingeniously referred to its oral origin. Under this system, when trifling objections were offered, they were either overruled at once or produced an immediate amendment. When, however, similar objections were allowed to written pleadings, and similar means of easy amendment were *not* permitted, the abuses of the system became very grievous, and the legislature has interfered, more or less effectually, by divers statutes, (commencing with the 32 Hen. 8, and ending with the C. L. Proc. Act, 1854,) with a view to remedy the evils in question, which pressed heavily on suitors. See 32 Hen. 8, c. 30; 18 Eliz. c. 14; 21 Jac. 1, c. 13; 16 & 17 Car. 2, c. 8; 4 & 5 Anne, c. 16; 5 Geo. 1, c. 30; 3 & 4 Will. 4, c. 42.

(*f*) See the remarks of Lord *Tenterden*, C. J., upon the advantages of special pleading, *Selby* v. *Bardons*, 3 B. & Ad. 16. In *Robinson* v. *Raley*, 1 Burr. 320, Lord *Mansfield*, C. J., also observes, that the substantial rules of pleading "are founded in strong sense, and in the soundest and closest logic, and so appear when well understood and explained: though, by being misunderstood and misapplied, they are often made use of as instruments of chicane." See Smith de Republicâ Anglorum, Lib. II. c. 16.

be decided by the jury, and are enabled to prepare their proofs with proportionate precision. If, on the other hand, it turns out to be matter of law, they have the means of immediately obtaining the decision of the cause, without the expense and trouble of a trial, by demurrer (*g*), that is, by referring the legal question so evolved to the determination of the Judge (*h*).

To carry out the legitimate object of pleading (a science which is governed as well by positive rules as by a known course of precedents (*i*)), not only must it be conducted with the special intent to raise material issues, but each stage of the legal controversy should be characterised by three qualities, viz., *certainty, precision,* and *brevity;* and since the Common Law Procedure Act, 1852 (*k*), and the changes consequent thereupon, it has become specially incumbent on the practitioner to refrain from prolixity or vagueness.

Declaration. The first step in the pleadings is the *declaration,* the plaintiff being bound to declare within one year after the writ of summons is returnable, or in default of doing so he will be deemed out of Court (*l*).

The declaration (as well as every other pleading), must be intitled of the proper Court and of the day when it was pleaded (*m*). It must also contain the statement of a *venue.* Formerly, every material fact in the declaration

Venue

(*g*) See post, p. 191.

(*h*) C. L. Com., 1st Rep., p. 13.

(*i*) Per *Maule,* J., 7 C. B. 104.

(*k*) See particularly ss. 51, 52.

(*l*) C. L. Proc. Act, 1852, s. 58; *Eadon* v. *Roberts,* 9 Exch. 227; *Chaplin* v. *Showler,* 6 D. & L. 227. No rule to declare is now required; a notice to the same effect is substituted in the stead of such rule: C. L. Proc. Act, 1852, s. 53; R. Pr. reg. 7, 176. If the plaintiff do not declare within one term next after the appearance is entered, judgment of nonpros may be signed against him. 1 Chit. Archb. Pr., 8th ed., pp. 184-6, 13 Car. 2, st. 2, c. 2, s. 3; *Foster* v. *Pryme,* 8 M. & W. 664.

(*m*) C. L. Proc. Act, s. 54.

had to be "laid with a venue," that is, was alleged to have happened in a certain place (*n*); but now the venue is confined to the margin of the declaration (*o*), local description, however, not being precluded in the body thereof when requisite. The substantial use of a venue is to inform the defendant where the cause is proposed to be tried. It serves also to instruct or inform the sheriff as to the county or place whence the jury was to be summoned to try the cause. The first Common Law Procedure Act, however, has effected some change with respect to jury process (*p*), and the sheriff, according to the present practice, summons, upon a precept issued to him by the judges of assize, jurors for the trial of *all* issues, civil and criminal, which may come on for trial at the assizes (*q*).

Formerly, it may be useful to remark, the jurors in civil suits were merely the witnesses who spoke from their own knowledge, or as they had been taught and told, with reference to the facts in issue—so that what the country knew, the country testified. If, for instance, a deed was pleaded, the witnesses named in the attesting clause were summoned upon the jury, because they were the persons whose evidence, being already recorded, was deemed essential to a decision of the case. So, when an estate was created by parol,

(*n*) Co. Litt. 125. a.; *Reg.* v. *Burdett*, 4 B. & Ald. 175.

(*o*) R. Pl., Hil. T., 1853, reg. 4; *Simmons* v. *Lillystone*, 8 Exch. 431; *Hitchins* v. *Hollingsworth*, 7 Moore, 228; *Brownlow* v. *Tomlinson*, 1 M. & Gr. 484. As to venue in the action of ejectment, see C. L. Proc. Act, 1852, c. 76, s. 182. As to venue generally, see 3 Bla. Com. p. 294; Bac. Abr. Visne or Venue; Toml. L. Dict. "Venue;" Steph. Pl., 5th edit., pp. 315 et seq.

(*p*) Sects. 104—116.

(*q*) A judge of a superior Court of common law issues the precept to the Sheriffs of London and Middlesex; and see C. L. Proc. Act, 1854, s. 59.

and the names of the persons who heard the declarations were ascertained, they were ordered to be on the panel; and, acting on the same principle in other cases, the sheriff followed the direction of the writ, and returned the names of the good and lawful men by whom the truth could best be known:—in other words, he selected the parties who happened to be best cognisant of the facts, those, for instance, who had seen the peaceable possession of the demandant of land, and the unlawful entry upon it of the intruder. Such methods of deciding civil controversies were, indeed, well adapted to a state of society, when the actual possession of land was the most usual and important point which could come before a jury, and when all transactions by which the right of property was acquired had every possible publicity. But the neighbouring freeholders or inhabitants of a district were ill competent to declare the truth, when they were called upon to give their verdict concerning questions arising out of transactions, which were gradually withdrawn from their notice, as the social system grew more refined, and became more complicated (*r*). Hence, as it has been remarked, "during the earliest ages of our judicial history, juries were selected for the very reasons which would now argue their unfitness, viz. their personal acquaintance with the parties and the merits of the cause" (*s*).

Venue—local or transitory.

The venue is either *transitory* or *local* (*t*). It is local when the cause of action stated in the declaration could by possibility, and in its nature, have had reference to a particular locality only, as in trespass qu. cl. fr. or eject-

(*r*) Palgr. Orig. Auth. of King's Counc., pp. 53—55

(*s*) 1 Smith L. C., p. 363; Judgm. *Mostyn* v. *Fabrigas*, Cowp. 161.

(*t*) See 1 Chit. Pl., 7th edit., pp. 279 et seq.

ment (*u*); but at the present day, in the great majority of cases,—wherever indeed the idea of locality does not necessarily attach,—the venue in the action is altogether transitory, and may be laid by the plaintiff in any county which he may himself prefer, and, when so laid, it can only be changed by consent of the parties, or by a special order of the Court or of a Judge (*x*).

Commencement and conclusion of declaration.

A form for the commencement and conclusion respectively of the declaration is given in the first Common Law Procedure Act (*y*), and these forms, or others "to the like effect," must be observed.

Body of declaration.

In the body of the declaration, the plaintiff must shew a state of facts which will, if unanswered, entitle him to judgment; i. e., he should put forward his complaint, expressed in language neither insensible nor ambiguous (*z*), and in such a shape that he will, in point of law and in the absence of any good and sufficient defence, have a right to *some* redress (*a*). When a written instrument is sued on, it may be set forth in the declaration, according to its legal effect, and need not necessarily be so *totidem ver-*

(*u*) By the C. L. Proc. Act, 1852, s. 41, where two or more of the causes of action joined in the same suit are local, and arise in different counties, the venue may be laid in either of such counties.

(*x*) R. Pl., reg. 18; *Skipp* v. *Ramsden*, 13 C. B. 601; *De Rothschild* v. *Shilston*, 8 Exch. 503; *Clulee* v. *Bradley*, 13 C. B. 604; *Begg* v. *Forbes*, 13 C. B. 614; *Wheatcroft* v. *Mousley*, 11 C. B. 677; *Pashley* v. *Mayor &c. of Birmingham*, 14 C. B. 421.

(*y*) Sects. 59 and 60.

(*z*) Steph. Pl., 5th edit., p. 414. *Ambiguum placitum interpretari debet contra proferentem;* see Co. Litt. 303. b.

As to an ambiguity in pleading being cured by pleading over, see *Boydell* v. *Harkness*, 3 C. B. 168; *Hobson* v. *Middleton*, 6 B. & C. 302; Per *Bayley*, J., *Moffatt* v. *Dickson*, 13 C. B. 543; *Emmens* v. *Elderton*, (in error), 4 H. L. Cas. 624; *S. C.* 13 C. B. 495.

(*a*) *Wood* v. *Curling*, 15 M. & W. 626; *S. C.* 16 M. & W. 628; *Coe* v. *Platt*, 6 Exch. 752; *S. C.*, 7 Exch. 460, 923; *Brown* v. *Mallett*, 5 C. B. 599. See also *Edis* v. *Bury*, 6 B. & C. 433; *Lloyd* v. *Oliver*, 21 L. J., Q. B., 307.

bis (*b*). The declaration concludes with a claim for damages, which should be to an amount sufficient to cover the whole of the plaintiff's demand (*c*).

As well in framing the declaration, as in the other pleadings in an action, certain rules must be observed and certain defects must be shunned. Of these it has been deemed advisable briefly to notice the more important (*d*) in the ensuing pages.

Rules of pleading.

Pleadings must neither be *double* nor *repugnant*. 'Duplicity' in a declaration occurs when any count thereof alleges several distinct matters, in support of the demand therein made, by any one of which that demand is sustainable (*e*); and 'repugnancy' is said to appear when the different allegations contained in any one count are inconsistent with each other (*f*). A plaintiff, under certain circumstances, however, may escape from the difficulty of electing between different modes of presenting his case, by inserting in his declaration several counts exhibiting, under different forms, his cause of action. But, as a general rule, several counts on the same cause of action are not allowed (*g*). And any

(*b*) In pleading, except in deducing title, a deed may, at the option of the party pleading it, be set out, either in its terms, leaving the Court to construe it, or according to its legal effect: *Lord Newborough* v. *Schröder*, 7 C. B. 342.

(*c*) *Cheveley* v. *Morris*, 2 W. Bla. 1300; *Pickwood* v. *Wright*, 1 H. Bla. 643.

(*d*) In selecting which, I have principally taken as my guide Mr. Serjeant Stephen's excellent Treatise on Pleading.

(*e*) Steph. Pl., 5th edit., p. 285. As to duplicity in various pleadings, see *Webster* v. *Watts*, 11 Q. B. 311; *Fearn* v. *Cochrane*, 4 C. B. 274; *Harrison* v. *Cotgreave*, 4 C. B. 562; *Heseltine* v. *Siely*, 21 L. J., Q. B., 305; *Smith* v. *Lovell*, 10 C. B. 6.

(*f*) Steph. Pl., 5th edit., p. 414.

(*g*) That is to say,—where the cause of action appearing in each of several counts, when examined with the eyes of a pleader, is one and the same. See per *Maule*, J., *Ramsden* v. *Gray*, 7 C. B. 967-8; *James* v. *Bourne*, 4 Bing. N. C. 420; *Hernod* v. *Wilkin*, 11 Q. B. 1.

In practice, a special count is often joined with a common count, though founded on the same transaction.

count in violation of this rule may, on application of the defendant, be struck out, unless, upon the objection being taken, the plaintiff is prepared to prove to the satisfaction of the Court or Judge that the particular count objected to is proper for determining the real question in controversy on its merits (*h*); otherwise he must be prepared at the trial to establish "a distinct cause of action" in respect of it (*i*), and if he fails to do so, he will have to pay all the costs which the insertion of the superfluous count may have occasioned.

It should, however, be observed, that different causes of action, of whatever kind—excepting those which give rise to replevin and ejectment—provided they be by and against the same parties and in the same rights, may be joined in the same suit—power being reserved to the Court or Judge to order separate trials when such joinder appears inexpedient (*k*).

In the Schedule (B) to the first Common Law Procedure Act are contained various forms of declarations adapted to circumstances of ordinary occurrence. Whilst, however, it is enacted that these statutory precedents shall be sufficient, it is also provided, that "the like forms may be used with such modifications as may be necessary to meet the facts of the case," and that nothing in the Act contained "shall render it erroneous or irregular to depart from the letter of such forms so long as the substance is expressed without prolixity" (*l*). Undoubtedly, therefore, *some* latitude is in every case to be allowed in framing the declaration (*m*); and this further appears from sect. 50, which enacts, that where issue is

(*h*) Reg. Pl., Hil. T., 1853, reg. 2.
(*i*) Id. reg. 3.
(*k*) C. L. Proc. Act, 1852, s. 41.
(*l*) Id. s. 91.
(*m*) See, further, *Wilkinson* v. *Sharland*, 10 Exch. 724; *Fagg* v. *Nudd*, 3 E. & B. 650; *Place* v. *Potts*, 8 Exch. 709.

joined on demurrer "the Court shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, defect in or lack of form; and no judgment shall be arrested, stayed, or reversed for any such imperfection, omission, defect in or lack of form." This provision, however, will not justify the pleader in indulging in inaccurate or verbose language. He must still take heed that he neither plead that which is mere matter of evidence, nor that of which the Court takes notice *ex officio*, nor that which would come more properly from the other side(*n*); nor should he allege circumstances which the law presumes or which are necessarily implied; nor affect an excessive particularity, on the one hand, which is not essential to his case (*o*), nor allow, on the other hand, a statement to be made so vague and general in its terms as to give to his adversary information which is not sufficiently specific (*p*).

Faults in pleading.

Departure.

Another fault in pleading occurs when a '*departure*' is committed (*q*). This is the term used when either party to the action, having taken up one ground of complaint in the declaration, or of defence in the plea, at a subsequent stage of the pleading deserts it in favour of another ground inconsistent therewith (*r*). Again, '*argumentativeness*' will not be sanctioned in Courts of law, for it is evidently essential, with a view to the conclusive determination of disputes,

Argumentativeness.

(*n*) *Wheeler* v. *Bavidge*, 9 Exch. 668. It is sometimes laid down as a rule, that "pleadings should be true;" and, understood in the sense that no litigant or his professional adviser should lend himself to concert false or sham pleas, the rule is obviously correct. See *Nutt* v. *Rush*, 4 Exch. 490; Steph. Pl., 5th edit., p. 488.

(*o*) Steph. Pl., 5th edit., pp. 379—413.

(*p*) *Grizewood* v. *Blane*, 11 C. B. 526; *Wilson* v. *Braddyll*, 9 Exch. 718.

(*q*) Steph. Pl., 5th edit., p. 451.

(*r*) As illustrating the nature of

that both parties should "advance their positions of fact in an absolute form, and not leave them to be collected by inference and argument only" (*s*). Against undue laxity, moreover, a section (*t*) of the first Common Law Procedure Act has been specifically levelled, enacting, that if any pleading be so framed as to prejudice, embarrass, or delay the fair trial of the action, the opposite party may apply to the Court or Judge to strike out or amend such pleading (*u*).

Particulars of demand.

It has been above observed (*v*), that one important attribute of pleading is '*certainty*.' To this term in former times was attached a technical signification, and many statements which are now rendered unnecessary (*w*)—such as of time, quantity, quality, value, &c., even when they had not to be proved, being immaterial to the issue—were then required to be made in the pleadings (*x*), with a view to producing 'certainty' therein. At the present day, this useless kind of particularity is abolished; but provision is made for securing to the defendant sufficient information as to the subject-matter of the complaint laid against him, when he really may require it, by enforcing upon the plain-

a 'departure,' see *Smith* v. *Marsack*, 6 C. B. 486; *Elliot* v. *Von Glehn*, 13 Q. B. 632; *Morris* v. *Walker*, 15 Q. B. 589; *Callow* v. *Jenkinson*, 6 Exch. 666.

(*s*) Steph. Pl., 5th edit., p. 422; *Sharland* v. *Leifchild*, 4 C. B. 529; *Smith* v. *Lovell*, 10 C. B. 6, (which case presents several examples of bad pleading); *Weedon* v. *Woodbridge*, 13 Q. B. 462; *Reade* v. *Lamb*, 6 Exch. 130; *Stewart* v. *Collins*, 10 C. B. 634; *Leaf* v. *Tuton*, 10 M. & W. 393.

A general rule for construing pleadings is given in *Moore* v. *Forster*, 5 C. B. 220.

(*t*) Sect. 52.

(*u*) *Messiter* v. *Rose*, 13 C. B. 162; *Forsyth* v. *Bristowe*, 8 Exch. 347; *Trent* v. *Hunt*, 9 Exch. 21; *Reg.* v. *The Saddlers' Co.*, 22 L. J., Q. B., 451; *S. C.* 1 B. C. C. 183; *Nutt* v. *Rush*, 4 Exch. 490; *Levy* v. *Railton*, 14 Q. B. 418; *Cutts* v. *Surridge*, 9 Q. B. 1015; *Smith* v. *Backwell*, 4 Bing. 512.

As to pleading evidence, see *Hancock* v. *Noyes*, 9 Exch. 388.

(*v*) Ante, p. 182.

(*w*) C. L. Proc. Act, 1852, s. 49.

(*x*) *Playter's case*, 5 Rep. 34 b; Steph. Pl., 5th edit., pp. 332—337; C. L. Com., 1st Rep., pp. 16, 18, 22, 23; *Harris* v. *Phillips*, 10 C. B. 650.

tiff the delivery of 'particulars of demand' in aid, as it were, of his declaration (*y*). In the indebitatus counts, for example, recently framed by the legislature, the statements of the plaintiff's claim are very general (*z*); but, practically, the object of certainty is attained whenever the common counts, or counts founded on causes of action of a like nature are used, by the plaintiff being called on—except when the writ has been specially indorsed—to "deliver or file full particulars of his demand, and, in default thereof, a Judge may order such particulars to be supplied" (*a*).

Profert and oyer.

There remain to be noticed two additional points, having reference to the declaration in common with the subsequent steps in pleading: 1. Profert and oyer are no longer necessary in pleadings (*b*); but when any document is referred to by the one party in his pleading, it may be set out, either wholly or in part, by his opponent, and is to "be deemed and taken to be part of the pleading in which it is set out" (*c*). 2. When the rights of a party pleading depend

Averments of conditions precedent.

(*y*) *Law* v. *Thompson*, 4 D. & L. 54, 57; *Berkley* v. *De Vere*, Id. 97; *Stannard* v. *Ullithorne*, 3 Bing. N. C. 326; *Bulnois* v. *Mackenzie*, 4 Bing. N. C. 127.

(*z*) Sched. (B.), C. L. Proc. Act, 1852, No. 1—14; *Bracegirdle* v. *Hinks*, 9 Exch 361. "Though formerly Courts were strict, yet now they draw nearer to common sense. There was a time when *assumpsit pro bonis et mercimoniis generally*, would have been wondered at; and *Holt* used to say, he was a bold man that first ventured on them:" *Hayes* v. *Warren*, 2 Str. 933.

(*a*) R. G. Pr., rr. 19—21; *Fussell* v. *Gordon*, 13 C. B. 847; *Harris* v. *Montgomery*, 11 C. B. 393.

These rules as to particulars of demand apply to particulars of set-off, when the latter contain "claims of a similar nature as those in respect of which a plaintiff is required to deliver or file particulars:" R. G. Pr. reg. 19.

(*b*) C. L. Proc. Act, 1852, s. 55; *Webb* v. *Adkins*, 14 C. B. 401; *Sim* v. *Edmands*, 15 C. B. 240; *Wood* v. *Copper Miners' Co.*, 14 C. B. 428. As to the former practice in regard to profert and oyer, see C. L. Com., 1st Rep., p. 25; Francis C. L. Proc., p. 35.

(*c*) Sect. 56; *Sims* v. *Edmands*, supra; *Reg.* v. *Sadlers' Co.*, 22 L. J., Q. B., 451; *S. C.* 1 B. C. C. 183.

As to the right of inspecting and copying documents in the hands of an opposite party, see 14 & 15 Vict.

upon the performance of conditions precedent, performance of such conditions may be averred generally (*d*); and "the opposite party shall not deny such averment generally, but shall specify in his pleading the condition or conditions precedent, the performance of which he intends to contest" (*d*).

The plea, &c.

There are several different modes in which a defendant may answer the plaintiff's claim. He may set up a defence, either, 1, by way of demurrer (*e*) to the declaration; or, 2, by pleading in abatement; or, 3, by pleading in bar (*f*) of the action; or, 4, he may both plead and demur (*g*) to the declaration; or, 5, he may pay money into Court and plead such payment; or, 6, he may set up certain equitable defences (*h*).

Demurrer.

A defendant, who wishes to demur to his adversary's declaration, must, according to the form given by the 89th section of the Common Law Procedure Act, 1852, allege that it "is bad in substance" (*i*); and the same section further enacts, that in the margin of the demurrer "some

c. 99, s 6; C. L. Proc. Act, 1854, s. 50; *Pepper* v. *Chambers*, 7 Exch. 226; *Sneider* v. *Mangino*, Id. 229; *Hill* v. *Philp*, Id. 232; *Hunt* v. *Hewitt*, Id. 236.

(*d*) Sect. 57; *Bentley* v. *Dawes*, 9 Exch. 666; *Bamberger* v. *Commercial Credit &c. Society*, 15 C. B. 676. See C. L. Com., 1st Rep., p. 25; *Rust* v. *Nottidge*, 1 E. & B. 99; *Phelps* v. *Prothero*, 16 C. B. 370.

(*e*) Objections to pleadings by way of special demurrer are taken away by the C. L. Proc. Act, 1852, s. 51.

(*f*) Another division of pleas is into that of *dilatory* and *peremptory* pleas, see Steph. Pl., 5th edit., pp. 550, 551.

(*g*) C. L. Proc. Act, 1852, s. 80. See *Lumley* v. *Gye*, 22 L. J., Exch., 9; *Sheehy* v. *Professional Life Ass. Co.*, 13 C. B. 801; *Price* v. *Hewett*, 8 Exch. 146.

It is within the discretion of the Court or a Judge to allow of both a plea and a demurrer under this section: *Thompson* v. *Knowles*, 18 Jur. 1018 (Exch.); *Platt* v. *Elce*, 22 L. J., Exch., 192.

(*h*) As to a plea to the jurisdiction, see Steph. Pl., 5th edit., p. 51; *Munden* v. *Duke of Brunswick*, 10 Q. B. 656; *Spooner* v. *Juddow*, 6 Moore P. C. C. 257.

(*i*) The same form, mutatis mutandis, is applicable at any stage of the pleadings.

substantial matter of law intended to be argued shall be stated; and, if any demurrer shall be delivered without such statement, or with a frivolous statement, it may be set aside by the Court or a Judge, and leave may be given to sign judgment as for want of a plea" (*k*). With respect to the time within which a defendant may thus demur or may plead in bar, it is enacted, that when he is within the jurisdiction of the Court where the action is brought, the time allotted for so doing, unless extended by the Court or a Judge, shall be *eight* days; and a notice requiring the defendant to plead in eight days, otherwise judgment, may, whether the declaration be delivered or filed, be indorsed upon the declaration, or delivered separately (*l*). But, if the defendant plead in abatement, he must do so within *four* days (*m*).

Time for pleading.

Plea in abatement.

A plea in abatement does not propose to answer the cause of action, but "shews ground for abating or quashing the original writ in a real or mixed action, or the declaration in a personal action, and makes prayer to that effect" (*n*). Such pleas have been discouraged in modern times (*o*), as exhibiting a tendency on the part of the defendant to evade, by technical objections, the trial of the matter alleged against him. The most common plea of this kind is for nonjoinder of those who ought to have been made parties to the suit. The provisions, however, of the

—of nonjoinder.

(*k*) As to the practice relating to demurrers, see R. Pr. 1853, rr. 14—17.

(*l*) C. L. Proc. Act, 1852, s. 63; R. Pr., rr. 9, 174—176.

As to the time for pleading after amendment, see C. L. Proc. Act, 1852, s. 90.

(*m*) 1 Chit. Archb. Prac., 8th edit., p. 208.

(*n*) Steph. Pl., 5th edit., pp. 52—56, and note 17; Chit. Pl., 7th edit., vol. 1, pp. 462 et seq.; Id. vol. 3, pp. 9 et seq.

(*o*) *Broadbent* v. *Ledward*, 11 Ad. & E. 209. A plea in abatement must be verified by affidavit: 4 Anne, c. 16, and see *Johnson* v. *Popplewell*, 2 Tyr. 717.

first Common Law Procedure Act (*p*), by which greater facility than was previously permitted is given for amendments in respect of nonjoinder of defendants in an action both before and at the trial, have rendered the use of this plea infrequent. Carrying out the principle, that a plea in abatement should give the plaintiff a better writ or declaration, it has been enacted, that when nonjoinder of any person as co-defendant is so pleaded, the defendant must allege in his plea that such person is resident within the jurisdiction of the Court, and verify his residence with convenient certainty by affidavit (*q*).

Plea in bar.

Certainty (*r*), brevity, and precision, which have been before alluded to as qualities requisite in the declaration, are no less essential in all the subsequent pleadings. But there are also divers special rules affecting pleas which should here be mentioned.

Pleas in bar (*s*) are divided into pleas by way of *traverse* —and by way of *confession and avoidance.*

Traverse.

A plea which answers the declaration by way of traverse (*t*), may either contradict specifically, in terms, some one or more essential or material allegation therein—which is called the 'common traverse'—or it may deny generally its entire allegations, or the principal fact or facts on which

General issue.

(*p*) Sects. 34—40, 222. See R. G. Pr., reg. 6; *Brashier* v. *Jackson*, 6 M. & W. 549; *Whitwill* v. *Scheer*, 8 Ad. & E. 301; *Sainsbury* v. *Matthews*, 4 M. & W. 346; *Crawfurd* v. *Cocks*, 6 Exch. 287; *Cowburn* v. *Wearing*, 9 Exch. 207.

(*q*) 3 & 4 Will. 4, c. 42, s. 8; *Joll* v. *Curzon*, 4 C. B. 249.

(*r*) As to certainty in pleas, see *Janson* v. *Stuart*, 2 Smith L. C. 30, and notes thereto.

(*s*) As to pleas in estoppel, which are of comparatively rare occurrence, see Steph. Pl., 5th edit., pp. 227, 228, 250, 251.

(*t*) Special traverses are now abolished, (see C. L. Proc. Act, 1852, s. 65), or at all events rendered unnecessary.

it is founded (*u*). In this latter case the form of traverse is called the 'general issue' (*x*).

At different periods in the history of pleading, the defences (*y*) permitted to be set up under the general issue have varied very materially. Before the Rules of Hil. T., 4 Will. 4, the general issue was held to comprehend, in the actions where it could be pleaded, a multitude of grounds of defence which, since those rules, have been withdrawn from its operation. The Pleading Rules of Hil. T., 1853, and the enactments of the first Common Law Procedure Act (*z*), determine what defences can now be properly raised under the general issue, and what must be specially pleaded—a

(*u*) Steph. Pl., 5th edit., p. 169; C. L. Proc. Act, 1852, ss. 76—79. By the 76th section, "a defendant may either traverse generally such of the facts contained in the declaration as might have been denied by one plea, or may select and traverse separately any material allegation in the declaration, although it might have been included in a general traverse:" *Cooling* v. *Great Northern R. C.*, 15 Q. B. 486. The provision in the latter part of the above section is an innovation on the former rules of pleading: see *Sutherland* v. *Pratt*, 11 M. & W. 312, 313.

By the 79th section of the above Act, it is provided, that "either party may plead in answer to the plea or subsequent pleading of his adversary, that he joins issue thereon," according to a certain form there given; and "such form of joinder of issue shall be deemed to be a denial of the substance of the plea or other subsequent pleading, and an issue thereon." As to the operation of this form of joining issue in a replication, see *Glover* v. *Dixon*, 9 Exch. 158.

(*x*) With respect to traversing matters of "inducement," it has been said, "whatever is material inducement, if not traversed, is admitted. Nothing is admitted by the plea of not guilty, except what is material to raise the duty, or create the obligation, for the breach of which the action is brought:" Judgm. *Grew* v. *Hill*, 3 Exch. 801.

As to inducements generally, see Steph. Pl., 5th edit., pp. 212, 277; *Smith* v. *Garbutt*, 3 E. & B. 83.

(*y*) 1 Chit. Pl., 7th edit., pp. 489, et seq.

(*z*) R. G. Pl., rr. 5—8, 10—12, 15—17, 19—21; C. L. Proc. Act, 1852, s. 76.

point proper to be observed, inasmuch as a plea amounting to the general issue is clearly objectionable, as violating the rule imposing brevity on the pleader; and such a plea might give rise to an application to a Judge to have it amended (*a*).

Non assumpsit.

With regard to the general issue of *non assumpsit* (*b*), the sixth pleading rule directs, that, "in all actions on simple contract, except as hereinafter excepted, the plea of non assumpsit, or a plea traversing the contract or agreement alleged in the declaration, shall operate only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters of fact from which the contract, promise, or agreement alleged may be implied by law" (*c*).

Nunquam indebitatus.

The plea of non assumpsit, however, is inadmissible where that of "*never was indebted*" is applicable (*d*). This latter plea, which is the general issue in the action of debt, operates "as a denial of those matters of fact from which the liability of the defendant arises; *ex. gr.* in actions for goods bargained and sold, or sold and delivered, the plea will operate as a denial of the bargain and sale, or sale and delivery, in point of fact" (*e*). In all actions for "money had and received," it will operate as a denial both of the receipt of money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plain-

(*a*) *Owen* v. *Challis*, 6 C. B. 115; *Solly* v. *Neish*, 2 Cr. M. & R. 355; *Morrison* v. *Chadwick*, 7 C. B. 266; *Dawson* v. *Collis*, 10 C. B. 523; *Sutherland* v. *Pratt*, 11 M. & W. 312, 313.

As to the scope of the Rules of Hil. T. 4 Will. 4, see per *Maule*, J., *Varney* v. *Hickman*, 5 C. B. 282.

(*b*) See the form of this plea, C. L. Proc. Act, Sched. (B.), No. 37.

(*c*) See the examples of the operation of *non assumpsit* annexed to reg. 6.

(*d*) See the form of this plea, C. L. Proc. Act, 1852, Sched. (B.), No. 36.

(*e*) Ante, p. 119.

General issue not allowed in action on bill or note.

tiff (*f*). The general issue is specially prohibited in actions upon bills of exchange and promissory notes. In such actions a plea in denial must traverse some matter of fact, as the drawing, making, indorsing, accepting, or presenting of the bill or note (*g*).

—non est factum.

The plea of *non est factum* (*h*), which occurs in an action on a bond or other specialty, will operate as a denial of the execution of the specialty declared on "in point of fact only" (*i*). And *non detinet*, which is the general issue in detinue (*k*), puts in issue the detention of the goods only in respect of which the plaintiff sues, but not his property therein (*l*).

—non detinet.

Not guilty.

In actions for torts, the plea of *not guilty* (*m*) will "operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the *inducement;* and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration" (*n*). Thus, "in an action for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house. In an action for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way. In

(*f*) R. Pl. reg. 6.

(*g*) R. Pl. reg. 7.

(*h*) See the form of this plea, C. L. Proc. Act, 1852, Sched. (B.), No. 38.

(*i*) R. Pl. reg. 10.

(*k*) Ante, p. 121.

(*l*) R. Pl. reg. 15.

(*m*) See the form of this plea, C. L. Proc. Act, 1852, Sched. (B.), No. 43.

(*n*) R. Pl. reg. 16.

an action for slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate in denial of speaking the words, of speaking them maliciously, and in the defamatory sense imputed, and with reference to the plaintiff's office, profession, or trade; but it will not operate as a denial of the fact of the plaintiff holding the office or being of the profession or trade alleged."

So, in actions for trespass to land, the plea of not guilty operates merely "as a denial that the defendant committed the trespass alleged in the place mentioned in the declaration;" and "in actions for taking, damaging, or converting the plaintiff's goods, the plea of *not guilty* shall operate as a denial of the defendant having committed the wrong alleged, by taking, damaging, or converting the goods mentioned, but not of the plaintiff's property therein" (*o*).

What plea may be pleaded together.

It should here be noticed, that, although in an action "several pleas, replications, or subsequent pleadings, or several avowries or cognizances founded on the same ground of answer or defence, shall not be allowed" (*p*); yet it is within the discretion of the Court or Judge before whom the matter is brought to suspend this rule in any case where, by so doing, the determining of the real question between the parties on its merits would seem likely to be secured. But "the following pleas, or any two or more of them, may be pleaded together as of course, *without leave* of the Court or a Judge; that is to say, a plea denying any contract or debt alleged in the declaration, a plea of tender as to part, a plea of the Statute of Limitations, set-off, bankruptcy of the defendant, discharge under an Insolvent

(*o*) R. Pl. reg. 19, 20. (*p*) R. Pl. reg. 2; see also reg. 3.

Act, plene administravit, plene administravit præter, infancy, coverture, payment, accord and satisfaction, release, not guilty, a denial that the property an injury to which is complained of is the plaintiff's, leave and license, son assault demesne," and any other pleas which the Judges may hereafter allow by any rules duly made (*q*). But *by leave* of the Court or a Judge, the defendant may "plead, in answer to the declaration or other subsequent pleading of the plaintiff, as many several matters as he shall think necessary for his defence;" although an affidavit of the party applying for leave to plead, or his attorney, may be required by the Court or Judge, "to the effect that he is advised and believes that he has just ground to traverse the several matters proposed to be traversed by him, and that the several matters sought to be pleaded as aforesaid by way of confession and avoidance (*r*) are respectively true in substance and in fact" (*s*).

What must be specially pleaded.

With respect to pleas which must be specially pleaded, it is directed (*t*), that in any species of action on contract, as well as in tort, "all matters in confession and avoidance, including not only those by way of discharge but those which shew the transaction to be either void or voidable in point of law on the ground of fraud or otherwise, shall be specially pleaded." Thus, "infancy, coverture, release, payment, performance, illegality of consideration either by statute or common law, drawing, indorsing, accepting, &c., bills or notes by way of accommodation, set-off, mutual cre-

(*q*) C. L. Proc. Act, 1852, s. 84.

(*r*) As to pleading in confession and avoidance, see ante, p. 178.

(*s*) C. L. Proc. Act, 1852, s. 81; and see Id. ss. 80, 82—86.

(*t*) R. Pl. rr. 8, 12, 17.

dit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences," must be specially pleaded (*u*).

Pleas in confession and avoidance may be, 1, in justification or excuse; 2, in discharge; or, 3, to the foundation of the action: these three classes of pleas are clearly distinguishable from each other. The characteristic of a plea belonging to class 1 is this,—that, whilst admitting the allegations contained in the declaration to be true, it puts forth new matter to excuse or justify the act charged against the defendant: in illustration of this class may be mentioned the plea of son assault demesne, or of leave and license (*x*).

Pleas in confession and avoidance—how classified.

In a plea falling within the 2nd of the above classes, the complaint set forth in the declaration is likewise admitted to be true; but matter in discharge of the liability sought to be imposed on the defendant is presented as a defence to the action (*y*), as, for instance, in a plea of payment, set-off, or the Statute of Limitations; to each of which pleas, being of frequent occurrence and practical importance, a few remarks will here be directed, before alluding more specifically to the third and last class of pleas above mentioned.

The form of a plea of payment before action, given by the first Common Law Procedure Act (*z*), is, that "before action he (the defendant) satisfied and discharged the plain-

Payment.

(*u*) R. Pl. reg. 8.

(*x*) *Weaver* v. *Ward*, Hob. 134.

(*y*) See an analytical table of defences to actions on contract not under seal, 1 Chitt. Pl., 7th ed., p. 488; *Dresser* v. *Gabriel*, 15 C. B. 622; *Flockton* v. *Hall*, 14 Q. B. 380.

(*z*) Sched. (B.), No. 40; Pl. R. reg. 14.

tiff's claim by payment" (*b*). If a ready-money transaction takes place, i. e. a simultaneous exchange of goods for money, or a prepayment of money in anticipation of the consideration being performed, it has been held, that the nature of this transaction need not be the subject of a special plea, but may be shewn under the general issue (*c*); and if payment were made *after* the action had been commenced, and it were accepted in full satisfaction and discharge of all the causes of action in respect of which it was made, and of damages and costs, the fact of such payment would still be a good defence (*d*). Payment may also be pleaded in satisfaction when the defendant has discharged (*e*) his debt by giving a bill or promissory note, taken by the plaintiff as money, for the debt, though the latter be greater in amount than the security thus given in satisfaction thereof.

Tender.

A plea of tender (*f*) is *always* accompanied in actions *ex contractu* by payment of money into Court (*g*). It is only

(*b*) As to satisfying a debt by the payment of a less sum than that due, see *Sibree* v. *Tripp*, 15 M. & W. 23, and post, p. 436; *Gaskill* v. *Skene*, 14 Q. B. 664; and note to *Cumber* v. *Wane*, 1 Smith L. C. 146.

(*c*) *Bussey* v. *Barnett*, 9 M. & W. 312; but see *Littlechild* v. *Banks*, 7 Q. B. 739; *Smith* v. *Winter*, 21 L. J., C. P., 158; *S. C.*, 12 C. B. 487.

(*d*) *Corbett* v. *Swinburne*, 8 Ad. & E. 673; Chitt. jun. Pl., p. 374; *Ansell* v. *Smith*, 3 Dowl. 193.

(*e*) *Sard* v. *Rhodes*, 1 M. & W. 153; *Gaskill* v. *Skene*, 14 Q. B. 664; *Griffiths* v. *Owen*, 13 M. & W. 58, 64; *James* v. *Williams*, 13 M. & W. 828; *Belshaw* v. *Bush*, 11 C. B. 191; *Sayer* v. *Wagstaff*, 5 Beav. 415. As to the appropriation of payments to specific debts, see *Mills* v. *Fowkes*, 5 Bing. N. C. 455; *Williams* v. *Griffiths*, 5 M. & W. 300; *Nottidge* v. *Prichard*, 2 Cl. & F. 379; *Webb* v. *Weatherby*, 1 Bing. N. C. 502, 505.

And as to payment of the debt of another by a third party, see *Jones* v. *Broadhurst*, 9 C. B. 173, and *Belshaw* v. *Bush*, supra.

(*f*) *Wade's case*, 5 Rep. 114 a; *Dixon* v. *Clark*, 5 C. B. 365; *Walsh* v. *Southworth*, 6 Exch. 150; *Thompson* v. *Jackson*, 1 M. & Gr. 242.

(*g*) *Pether* v. *Shelton*, 1 Str. 638.

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available to the defendant when the plaintiff's demand is certain in its character and is in the nature of a debt, although its amount may not have been expressly agreed upon between the parties. A tender cannot be pleaded to an action for purely unliquidated damages, as for breach of an agreement (*h*), nor where the intervention of a jury or reference to a master is necessary for ascertaining the amount really due. It should be observed, with respect to the mode of tender, that to be good it must be unconditional (*i*).

Payment into Court.

The first Common Law Procedure Act (*k*) has made express provision with respect to the plea of payment of money into Court. The form of the plea given by the statute (*l*), sufficiently explains its character. It states that the defendant "brings into Court the sum of £——, and says that the said sum is enough to satisfy the claim of the plaintiff, in respect of the matter herein pleaded to." Money may be thus paid into Court "by way of compensation or amends" in all actions "except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation, or debauching of the plaintiff's daughter or servant" (*m*).

The effect of the plea of payment into Court is to admit some cause of action (*n*); and it is of importance to note the nature and extent of the admission which the defendant makes thereby. In recent cases, this question has been

(*h*) *Dearle* v. *Barrett*, 2 Ad. & E. 82.

(*i*) 1 Wms. Saund., 6th edit., 33 e; *Bowen* v. *Owen*, 11 Q. B. 130; *Finch* v. *Miller*, 5 C. B. 428; *Richardson* v. *Jackson*, 8 M. & W. 298; *Bevans* v. *Rees*, 5 M. & W. 306.

(*k*) Sects. 70—73; Pr. R. rr. 11, 12.

(*l*) Sect. 71.

(*m*) Sect. 70. See also 6 & 7 Vict. c. 96, s. 2.

(*n*) *Jones* v. *Reade*, 5 Dowl. 216.

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carefully considered (*n*), and we may deduce therefrom, that, on a general count in indebitatus assumpsit or debt, the plea of payment into Court admits only a cause of action to the amount paid into Court, and no more, and is an admission for no other purposes whatever. If, in such a case, the payment be made by two or more defendants jointly sued, it will not operate as an admission of any partnership or joint contract between them, which could render them liable beyond the amount so paid in; so that, if the plaintiff seeks to recover an additional amount, he will have to prove a contract under which the defendants are jointly liable to an amount exceeding that paid in. If, however, the declaration is framed on a special agreement, the rule is different, for payment into Court will admit the contract and the breach of it as alleged. In an action of tort, "when the declaration is general and unspecific, the payment of money into Court, though it admits a cause of action, does not admit *the* cause of action sued for;" so that the plaintiff, in order to recover larger damages than the amount paid into Court, must give evidence of the cause of action sued for (*o*). But, if the declaration is specific, so that nothing would be due to the plaintiff from the defendant, unless the defendant admitted the particular claim made by the declaration, payment of money into Court admits the cause of action sued for, and so stated specifically in the declaration; although even then, in some cases, it may be necessary for the

(*n*) *Schreger* v. *Carden*, 11 C. B. 851; *Perren* v. *The Monmouthshire R. C.*, 11 C. B. 855; *Story* v. *Finnis*, 6 Exch. 123.

In an action on a bond, where breaches are assigned under the 8 & 9 Will. 3, c. 11, money cannot be paid into Court under the provisions of the C. L. Proc. Act, 1852: *The Bishop of London* v. *M'Neil*, 9 Exch. 490.

(*o*) Judgm., *Perren* v. *The Monmouthshire R. C.*, 11 C. B. 865-6.

plaintiff to prove his cause of action, with a view to the amount of damages.

The pleas of tender and of payment into Court have been said (*p*) to present exceptions to the rule, that pleas must be either by way of traverse or in confession and avoidance of the cause of action. In strictness they are pleas in confession and satisfaction, by matter subsequent to the commencement of the suit, of the claim put forth. It has been deemed convenient, however, to notice them in this place.

Set-off.

The form of a plea of set-off given by the first Common Law Procedure Act (*q*), is that "the plaintiff, at the commencement of this suit, was and still is indebted to the defendant in an amount equal to the plaintiff's claim, for [here state the cause of set-off, as in a declaration,] which amount the defendant is willing to set off against the plaintiff's claim." The opportunity extended to a defendant to forego a cross action, in respect of the subject matter of his plea of set-off, is given by statute (*r*), but this plea is allowable only "where there are mutual debts between plaintiff and defendant" due in the same right (*s*), "or (if either party sue or be sued as executor or administrator) when there are mutual debts between the testator or intestate and either party" (*t*). The right of set-off exists "notwithstanding that

(*p*) Steph. Pl., 5th edit., pp. 252-3.

(*q*) Sched. (B.), No. 41.

(*r*) 2 Geo. 2, c. 22; 8 Geo. 2, c. 24.

(*s*) *Isberg* v. *Bowden*, 22 L. J., Exch., 322; *Bell* v. *Carey*, 8 C. B. 887; *Castelli* v. *Boddington*, 1 E. & B. 66; *Richards* v. *James*, 2 Exch. 471; *Eyton* v. *Littledale*, 4 Exch. 159; *Grant* v. *The Royal Exch. Ass. Co.*, 5 M. & S. 439; *Gale* v. *Luttrell*, 1 Y. & J. 180; Chitt. Contr. 5th edit., pp. 737 et seq.

(*t*) 2 Geo. 2, c. 22, s. 13; *Attwooll* v. *Attwooll*, 2 E. & B. 23; *Mardall* v. *Thellusson*, 21 L. J., Q. B., 410; *Watts* v. *Rees*, 9 Exch. 696.

such debts are deemed in law to be of a different nature, unless in cases where either of them accrues by reason of a penalty contained in any bond or specialty"(*u*).

A plaintiff may, however, preclude the necessity of a plea of set-off, by giving credit for such cross demands as his opponent might otherwise have made the subject of a plea of this nature. And by the 13th pleading rule (*x*), it is ordered, that "in any case in which the plaintiff (in order to avoid the expense of the plea of payment or set-off) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, or which the plaintiff admits the defendant is entitled to set off, it shall not be necessary for the defendant to plead the payment or set-off of such sum or sums of money. But this rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums, or to cases of set-off where the plaintiff does not state the particulars of such set-off."

With respect to pleas of payment, set-off, and all other pleadings capable of being construed distributively, it is enacted by sect. 75 of the first Common Law Procedure Act, that they "shall be taken distributively; and if issue is taken thereon, and so much thereof as shall be sufficient answer to part of the causes of action proved shall be found true by the jury, a verdict shall pass for the defendant in respect of so much of the causes of action as shall be an-

(*u*) 8 Geo 2, c. 24, s 5. As to when a plea of payment or of set-off should be pleaded, see *Thomas* v. *Cross*, 7 Exch. 728.

(*x*) See also R. Pr. reg. 19; *Russell* v. *Gordon*, 13 C. B. 847.

swered, and for the plaintiff in respect of so much of the causes of action as shall not be so answered" (*y*).

Statutes of Limitation.

The object of the Statutes of Limitation is, we are told (*z*), "to preserve the peace of the kingdom, and to prevent those innumerable perjuries which might ensue if a man were allowed to bring an action for any injury committed at any distance of time."

The leading Statutes of Limitation are 21 Jac. 1, c. 16, 3 & 4 Will. 4, c. 27, and 3 & 4 Will. 4, c. 42. The 9 Geo. 4, c. 14 (commonly called Lord Tenterden's Act), was enacted, inter alia, because various questions had "arisen in actions founded on simple contract as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operation" of the Statute of James, and will therefore likewise hereafter demand notice. Under 21 Jac. 1, c. 16, s. 1, an uninterrupted adverse possession for twenty years operated as a complete bar to an action in ejectment, except under circumstances of disability enumerated in the 2nd section of that statute, viz. infancy, coverture, unsoundness of mind, imprisonment, and absence beyond seas. In these cases, the party who was suffering under disability at the time when the right of entry first accrued, was allowed to bring his action (*a*) at any time within ten years after its removal;

Limitation of actions—ejectment, &c.

21 Jac. 1, c. 16.

(*y*) See per *Jervis*, C. J., *Wilkinson* v. *Kirby*, 15 C. B. 430; *Gabriel* v. *Dresser*, Id. 627.

(*z*) 3 Bla. Com., p. 307. See also Per *Story*, J., *Bell* v. *Morrison*, 1 Peters (U. S.) R. 360.

(*a*) See notes to *Nepean* v. *Doe*, and *Taylor* d. *Atkyns* v. *Horde*, 2 Smith L.C. pp. 396 et seq.; *Lafond* v. *Ruddock*, 13 C. B. 813, which was decided under sect. 7 of the Statute of James. See *Ruckmaboye* v. *Lulloobhoy Mottichund*, 8 Moore P. C. C. 4; *Strithorst* v. *Græme*, 3 Wils. 145.

3 & 4 Will. 4, c. 27.

and now, under 3 & 4 Will. 4, c. 27, s. 2, no person shall make an entry or distress, or bring an action to recover any land or rent (*b*), but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued (*c*) to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same (*d*). By the 16th section of the last-mentioned statute, persons under the disabilities enumerated therein are allowed ten years from the termination of such disability, or their representatives the same period from their death or the termination of their disability, whichever shall first happen, to bring actions of the kind now alluded to; though by a proviso in the 17th section, no such action shall be brought but within forty years next after the right of action shall have accrued.

3 & 4 Will. 4, c. 42.

Under the 3 & 4 Will. 4, c. 42, s. 3, all actions of debt for rent upon an indenture of demise, or of covenant or debt upon any bond (*e*) or other specialty, &c., and actions of debt

(*b*) *James* v. *Salter*, 3 Bing. N. C. 544, 552; *Dean and Chapter of Ely* v. *Cash*, 15 M. & W. 617; *Doe* d. *Lansdell* v. *Gower*, 17 Q. B. 589; *Doe* d. *Baddeley* v. *Massey*, 17 Q. B. 373; *Smith* v. *Lloyd*, 9 Exch. 562; *Humfrey* v. *Gery*, 7 C. B. 567; *Manning* v. *Phelps*, 10 Exch. 59.

(*c*) *Doe* d. *Davy* v. *Oxenham*, 7 M. & W. 131; *Keyse* v. *Powell*, 2 E. & B. 132; *De Beauvoir* v. *Owen*, 5 Exch. 166; *Cork and Bandon R.C.* v. *Goode*, 13 C. B. 618, 826; *Randall* v. *Stevens*, 2 E. & B. 641; *Austin* v. *Llewellyn*, 9 Exch. 276; *Doe* d. *Palmer* v. *Eyre*, 17 Q. B. 366; *Doe* d. *Baddeley* v. *Massey*, 17 Q. B. 373.

(*d*) *Grant* v. *Ellis*, 9 M. & W. 113; *Forsyth* v. *Bristowe*, 8 Exch. 716; *Melling* v. *Leak*, 16 C B. 652; *Manning* v. *Phelps*, 10 Exch. 59.

(*e*) *Amott* v. *Holden*, 22 L. J., Q. B., 14; *Kempe* v. *Gibbon*, 12 Q. B. 662.

or sci. fa. upon recognizance shall be commenced and sued within twenty years after the cause of such actions or suits; and actions for penalties, damages, or sums of money given by statute to parties grieved, within two years after the cause of such actions and suits accruing; and actions of debt upon any award when the submission is not by specialty, or for any fine due in respect of any copyhold estate, or for an escape, or for money levied on any fi. fa., within six years after the cause of action shall have accrued. The 4th section contains a proviso with regard to persons labouring under the disabilities therein mentioned; and the 5th section provides, that in cases of due acknowledgment in writing or payment on account of principal or interest, then the statute shall not preclude an action for the cause acknowledged till twenty years after such acknowledgment (*f*).

Limitation of action upon simple contract. 21 Jac. 1, c. 16, s. 3.

With respect to the period of limitation in actions of simple contract, it is enacted by 21 Jac. 1, c. 16, s. 3, that all actions of account and of assumpsit (other than for such accounts (*g*) as concern the trade of merchandise between merchant and merchant, their factors or servants), and all actions of debt grounded upon any lending or contract without specialty (*h*), and all actions of debt for arrearages of rent (*i*), shall be commenced and sued within six years next after the cause of such action or suit, and not after.

(*f*) *Blair* v. *Ormond*, 17 Q. B. 439; *Kempe* v. *Gibbon*, 12 Q. B. 662.

(*g*) *Webber* v. *Tivill*, 2 Wms. Saund. 124; *Robinson* v. *Alexander*, 2 Cl. & F. 717, 737; *Inglis* v. *Haigh*, 8 M. & W. 769; *Pott* v. *Clegg*, 16 M. & W. 321.

(*h*) *Cork and Bandon R. C.* v. *Goode*, ubi sup. n. (*c*.); *Webster* v. *Kirk*, 17 Q. B. 944; *Tobacco Pipe Makers Co.* v. *Loder*, 16 Q. B. 765.

(*i*) See 3 & 4 Will. 4, c. 27, s. 42.

The 7th section of this Act (*k*) relates to persons labouring under particular disabilities, and enacts, that persons so situated must sue within six years after the particular disability shall have ceased (*l*).

9 Geo. 4, c. 14.

The 9 Geo. 4, c. 14, was passed (so far as it relates to the limitation of suits) with the express view that a defendant should not lose the benefit of the Statute of James by such an informal or casual acknowledgment of a debt or contract as might previously have been interpreted to bar the operation of the latter statute (*m*). The 9 Geo. 4, c. 14, does not alter the law as to the effect of an acknowledgment of a debt; it alters only the manner in which the acknowledgment must be proved (*n*). Very numerous cases—some of which are below cited—have been decided as to what is an "acknowledgment" of a debt generally,

(*k*) See also, as to defendants, 4 & 5 Ann. c. 16, s. 19; *Fannin* v. *Anderson*, 7 Q. B. 811; *Towns* v. *Mead*, 16 C. B. 123; *Lane* v. *Bennett*, 1 M. & W. 70; *Forbes* v. *Smith*, 11 Exch. 161.

(*l*) *Le Veux* v. *Berkeley*, 5 Q. B. 836.

(*m*) The 9 Geo. 4, c. 14, s. 1, enacts, "That in actions of debt or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of" the 21 Jac. 1, c. 16, "or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby:" *Hyde* v. *Johnson*, 2 Bing. N. C. 776; *Clark* v. *Alexander*, 8 Scott, N. R., 147. The section above cited then makes provision respecting the chargeability of joint contractors (as to which, see *Whitcomb* v. *Whiting*, 1 Smith L. C. 318, and note thereto), and proceeds:—"Provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever:" *Hollis* v. *Palmer*, 2 Bing. N. C. 713; *Turney* v. *Dodwell*, 3 E. & B. 136; *Bodger* v. *Arch*, 10 Exch. 333. And see sect. 4 of the Act which applies to set-off.

(*n*) Per *Williams*, J., *Smith* v. *Thorne*, 18 Q. B. 135.

and what is the effect of the statute here adverted to (*o*).

—of actions ex delicto.

With regard to actions ex delicto, the respective periods of limitation assigned by the Statute of James above mentioned are as follows:—in trespass qu. cl. fr., or de bonis asp.; in trover, detinue, replevin, and case (*p*) (except for slander), six years; in trespass for assault, battery, or false imprisonment (*q*), four years; and in case for slander, two years. Besides the enactments as to the limitation of actions just considered, special provisions occur in various other statutes restricting the time within which particular actions must respectively be brought (*r*). Such provisions are in general framed for the protection of certain classes of defendants on grounds of public policy.

Whenever a Statute of Limitation is primâ facie pleadable, the precise point of time from which it appears to run should carefully be marked, and likewise the legal status of the party entitled to sue at that epoch, the maxim of law being *contra non valentem agere nulla currit præscriptio;* conformably to which rule the several provi-

(*o*) *Tanner* v. *Smart*, 6 B. & C. 603; *Tippets* v. *Heane*, 1 Cr. M. & R 252; *Hooper* v. *Stephens*, 4 Ad. & E. 71; *Williams* v. *Griffith*, 3 Exch. 335; *Howcutt* v. *Bonser*, Id. 491; *Sims* v. *Brutton*, 5 Exch. 809; *Foster* v. *Dawber*, 6 Exch. 839; *Turney* v. *Dodwell*, 3 E. & B. 136; *Cleave* v. *Jones*, 6 Exch. 573; *Davies* v. *Edwards*, 7 Exch. 22; *Bamfield* v. *Tupper*, Id. 27; *Evans* v. *Simon*, 9 Exch. 282; *Cawley* v. *Furnell*, 12 C. B. 291; *Kempe* v. *Gibbon*, 12 Q. B. 662; *Smith* v. *Thorne*, 18 Q. B. 134; *Willins* v. *Smith*, 4 E. & B. 185; *Bradley* v. *James*, 13 C. B. 822. And see the previous cases collected in Chitt. jun Contr., 4th edit., pp. 699 et seq.

(*p*) See *Duke of Brunswick* v. *Harmer*, 14 Q. B. 185 (which was an action for libel); *Imperial Gas Co.* v. *London Gas Co.*, 10 Exch. 39.

(*q*) *Coventry* v. *Apsley*, Salk. 420.

(*r*) See 31 Eliz. c. 5; 4 & 5 Anne, c. 16 (as to which see *Lane* v. *Bennett*, 1 M. & W. 70); 24 Geo. 2, c. 44, s. 8; 5 & 6 Vict. c. 97; 9 & 10 Vict. c. 93; 9 & 10 Vict. c. 95, s. 138; 11 & 12 Vict. c. 44, s. 8. See ante, p. 114.

sions with respect to 'disability,' already (*s*) mentioned, suspend the operation of the statute in question until such disability has ceased. So soon, however, as a complainant has a right to commence an action, the statute begins to run; ex. gr. if by an agreement money is to be paid on the happening of a certain contingency, the statute will begin to run when that event has occurred and a breach of the agreement has been committed. But whenever the time of limitation has once begun to run, it continues so to do (*t*). Again, where in assumpsit on a plea of the Statute of Limitations the breach of contract was shewn to have occurred more than six years before the commencement of the proceedings, the plea was held to be a good bar to the action, although the plaintiff did not discover the injury resulting from the breach till within the six years (*u*). And it was recently decided (*x*) to be no answer to a plea of the Statute of Limitations that the plaintiff was prevented by the fraud of the defendant from knowing of the cause of action until after the period of limitation had expired; for, as remarked by *Pollock*, C. B. (*y*). it would open a flood of litigation if Courts of law were to hold that the statute does not run in cases where fraud has been practised.

Pleas to the foundation of the action.

The third sub-division of pleas in confession and avoidance (*z*) comprises those which go to the foundation of the action, as pleas of fraud, or misrepresentation inducing to a contract, illegality, or coverture when pleadable in bar (*a*).

(*s*) Ante, p. 205.

(*t*) *Rhodes* v. *Smethurst*, 4 M. & W. 42. See *Lafond* v. *Ruddock*, 13 C. B. 813, 819.

(*u*) *Short* v. *M'Carthy*, 3 B. & Ald. 626; *Brown* v. *Howard*, 2 B. & B. 73; *Howell* v. *Young*, 5 B. & C. 259, *Granger* v. *George*, Id. 149; *Brec* v. *Holbech*, 2 Dougl. 654.

(*x*) *Imperial Gas Light Co.* v. *London Gas Light Co.*, 10 Exch. 39.

(*y*) 10 Exch. 43.

(*z*) Ante, p. 199.

(*a*) Such pleas are, on adequate

A plea belonging to this class, whilst admitting an ostensible or primâ facie ground of action, is aimed at shewing that the cause put forth never had any substantial existence or legal entity. In any case such as is now adverted to, the plaintiff discloses a claim which is on the face of it valid and unimpeachable. The defendant, however, by special averments neutralizes the legal character of, and thus entitles himself to deny, the legal consequences flowing from the facts alleged by the plaintiff.

Equitable defences, &c.

The equitable pleas, &c. alluded to at page 191 as being, in certain cases, permissible at common law, are founded on the 83rd and following sections of the Second Common Law Procedure Act (*b*), enacting that "It shall be lawful for the defendant, or plaintiff in replevin, in any cause in any of the superior Courts in which, if judgment were obtained, he would be entitled to relief against such judgment on equitable grounds, to plead the facts which entitle him to such relief by way of defence, and the said Courts are hereby empowered to receive such defence by way of plea: provided that such plea shall begin with the words 'for defence on equitable grounds,' or words to the like effect;" and further enacting, that "the plaintiff may reply, in answer to any plea of the defendant, facts which avoid such plea upon equitable grounds" (*c*); and providing, that in case it shall appear to the Court or any judge thereof that any such equitable plea or equitable replication cannot be dealt with by a Court of law, so as to do justice between the parties, it shall be lawful for such Court or judge to order the same

authority, included under the general head of pleas in confession and avoidance: see R. Pl, reg. 8.

(*b*) 17 & 18 Vict. c. 125, ss. 83—88.

(*c*) Id. s. 85.

to be struck out, on such terms as to costs and otherwise as to such Court or judge may seem reasonable (*d*).

To what extent the superior Courts will admit of equitable pleading, thus imported into common law, is, as may be seen on reference to the cases below cited (*e*), as yet unsettled. The Courts seem hitherto to have inclined towards limiting the pleading of equitable defences to those cases only in which equity would grant a perpetual and unconditional injunction (*f*); but whether the provisions of the statute above specified may not receive an interpretation more liberal and more in unison with the supposed intention of the legislature enacting them, remains to be seen (*g*).

(*d*) Id., 86. See *Taff Vale R. C.* v. *Nixon*, 1 H. L. Cas. 111.

The sections alluded to supra, concerning equitable defences, do not apply to the action of ejectment, in which there are no pleadings: *Neave* v. *Avery*, 16 C. B. 329.

(*e*) *Mines Royal Societies* v. *Magnay*, 10 Exch. 489, where an equitable plea which had been disallowed at law, was afterwards entertained in equity. See *S. C.*, 3 Drew. 130; 24 L. J., Chanc., 413; *Steele* v. *Haddock*, 10 Exch. 645; *Wodehouse* v. *Farebrother*, Q. B., Trin. T., 1855; *Chilton* v. *Carrington*, 16 C. B. 211; *Farebrother* v. *Welchman*, 24 L. J., Chanc., 410; *Simpson* v. *Sadd*, Id., C. P., 157; *Anon.*, cor. *Crompton*, J. (Bail Court), Mich. T., 1854, 3 Weekly Rep. 110; *Phelps* v. *Prothero*, 16 C. B. 370. See *Lord Petre* v. *Stubbs*, 3 W. Rep. Q. B. 406; *Holmes* v. *Tutton*, 24 L. J., Q. B., 346.

(*f*) In *Mines Royal Societies* v. *Magnay*, supra, *Parke*, B., observed, "In my opinion the equitable defence allowed to be pleaded by this statute means such a defence as would, in a Court of equity, be a complete answer to the plaintiff's claim, and would, as such, afford sufficient ground for a perpetual injunction, granted absolutely and without any conditions." But see per *Crowder*, J., and *Jervis*, C. J., *Chilton* v. *Carrington*, supra. See also *Burgoyne* v. *Cottrell*, 24 L. J., Q. B., 28.

(*g*) In a late case, where a defendant in a Court of law had pleaded equitable pleas of set-off, and after replication thereto filed a bill for an injunction in equity, setting up the same case as in his defence at law, *Kindersley*, V. C., observed, "When I find that by the Common Law Procedure Act parties are entitled to set up matters which would be a good defence in equity, it seems to

In *Phelps* v *Prothero* (*h*) a plea by way of equitable defence was set up, to the effect that the plaintiff had elected to proceed in equity, and therefore could not proceed at law. This plea was held bad, *Maule*, J., remarking, "The object of giving an equitable jurisdiction to this Court was not to interfere in any way with the jurisdiction of the Court of Chancery; but merely that in the event of a defendant having some equitable defence to an action here, or of a plaintiff having some equitable answer to a legal defence, such equitable defence or equitable answer might be considered and disposed of here without putting the parties to the expense and delay of an application to the Court of Chancery for relief in the matter."

Replication.

A notice requiring the plaintiff to *reply* to the plea within four days may be given him by the defendant (*i*); and the replication must be framed with reference to recent alterations made in the mode of pleading. Thus, it is enacted, that "a plaintiff shall be at liberty to traverse the whole of any plea or subsequent pleading of the defendant by a general denial; or, admitting some part or parts thereof, to deny all the rest, or to deny any one or more allegations" con-

me that the very purpose of the enactment was to prevent those against whom actions are brought from being obliged to come to a Court of equity, to get the benefit of an equitable defence. The defendant has put in certain pleas, and they have been replied to. I must assume, therefore, that if the defendant can support his pleas, judgment will be in his favour. This is my view of the case; and if I were to hold otherwise, I should, I think, be deciding that the Act of Parliament is inoperative, and cannot be carried out. There is no matter of complicated accounts involved here, it is a mere question of fact; and I cannot understand why it is necessary to have it tried in this Court:" *Farebrother* v. *Welchman*, 24 L. J., Chanc., 412. See also C. L. Com., 2nd Rep., pp. 45, 46; Francis' Com. L. Proc., pp. 245 et seq.

(*h*) 16 C. B. 370.

(*i*) C. L. Proc. Act, 1852, s. 53, which applies also to the pleadings subsequent to replication.

tained therein (*i*); and further, that "either party may plead in answer to the plea or subsequent pleading of his adversary, that he joins issue thereon;" and "such form of joinder of issue shall be deemed to be a denial of the substance of the plea or other subsequent pleading and an issue thereon, and in all cases where the plaintiff's pleading is in denial of the pleading of the defendant, or some part of it, the plaintiff may add a joinder of issue (*j*) for the defendant" (*k*). The object, it has been very recently observed, of the form of pleading thus given by the Act, "is merely to enable a party in a compendious manner to traverse all those allegations in a plea which he could have traversed before" (*l*); and indeed this mode of denying the substance of the plea "is in the nature of a general replication *de injuriâ* (*m*). But such matters as before the Act must have been replied specially must still be so replied" (*n*) —whether by traverse or by pleading in confession and avoidance.

(*i*) C. L. Proc. Act, 1852, s. 77.

Analogous provisions are made with respect to the subsequent steps of the pleading. By sect. 78 "A defendant shall be at liberty in like manner to deny the whole or part of a replication or subsequent pleading of the plaintiff."

(*j*) The adding of a joinder in issue is technically called adding a similiter.

(*k*) C. L. Proc. Act, 1852, s. 79.

(*l*) Per *Pollock*, C. B., *Glover* v. *Dixon*, 9 Exch. 160.

(*m*) The learning now obsolete connected with which is to be found in *Crogate's case*, 1 Smith L. C. 53.

(*n*) Per *Parke*, B., *Glover* v. *Dixon*, supra.

A replication by way of *new assignment* is permitted, when the defendant, owing to the general form of the declaration, has given an answer in his plea, not to the real cause of complaint, but to another, to which the language of the declaration may also be applicable. The plaintiff is then allowed to explain as it were the real object of his declaration by new assigning his cause of action; and the defendant is prohibited, except by leave of the Court or a Judge, from answering the matter of the new assignment by a repetition of the plea which he has employed in reply to the declaration, unless, indeed, that was a plea in denial. In regard to new assign-

The pleadings subsequent to replication (*o*) are conducted on the same plan as those already noticed, either by joining issue when tendered on the other side, or by demurring, traversing, or pleading in confession and avoidance. Subsequent pleadings.

If the issue tendered be one of law, "the party demurring may give a notice to the opposite party to join in demurrer in four days" (*p*), with the alternative of judgment being signed against him at the expiration of that time. On joinder in demurrer, it will, at the request of either plaintiff or defendant, be set down for argument in the 'special paper' of the Court in which it is to be determined, four clear days before the argument takes place (*q*). Copies of the pleadings relating to the demurrer have to be made up (*r*) and delivered to the judges in the mode prescribed by the Practice Rules. If, besides the demurrer, there are issues of fact to be tried, in the event of the judgment on the demurrer being for the defendant on a plea answering the whole action, the only judgment which the plaintiff can have upon issues of fact previously found for him, is *nil capiat per breve* (*s*); but, in the event of the judgment being for the plaintiff under similar circumstances, he should proceed to have the issues of fact brought before the jury, and damages also assessed upon the issue of law (*t*). Demurrer.

ments, see C. L. Proc. Act, 1852, ss. 87, 88; *Glover* v. *Dixon*, 9 Exch. 158; *Hayling* v. *Okey*, 8 Exch. 531; *Humfrey* v. *London and North Western R. C.*, 7 Exch. 328; 1 Chitt. Pl., 7th edit., pp. 653 et seq.

(*o*) As to the plea *puis darrein continuance*, see C. L. Proc. Act, 1852, ss. 68, 69; R. Pl., rr. 22, 23; *Todd* v. *Emly*, 9 M. & W. 606; *Dunn* v. *Loftus*, 8 C. B. 76; *Wagner* v. *Imbrie*, 6 Exch. 380; *Solomon* v. *Graham*, 24 L. J., Q. B., 332.

(*p*) R. Pr. reg. 14.

(*q*) R. Pr. reg. 15.

(*r*) See R. Pr. reg. 16, 17; *Dorsett* v. *Aspdin*, 2 L. M. & P. 625.

(*s*) 1 Wms. Saund. 80 (1); *Young* v. *Beck*, 3 Dowl. 804.

(*t*) See *Smith* v. *Hartley*, 11 C. B. 678.

Notice of trial.

The action being ripe for trial (*u*), *notice of trial* (*x*) must be given to the defendant—the practice respecting which is regulated by the First Common Law Procedure Act (*y*) and the Practice Rules (*z*). It will suffice here to say, that, under ordinary circumstances, *ten* days notice of trial must be given; and when the terms of taking 'short notice' of trial are imposed upon the defendant, a *four* days notice is signified thereby.

Judgment by default.

Should the defendant at any stage of the suit omit to plead in due time, judgment by default may be signed; and when the claim is for a debt or 'liquidated demand' in money, such judgment is final (*a*). When, however, the claim is for damages, the amount of which "is substantially a matter of calculation, it shall not be necessary to issue a writ of inquiry (*b*), but the Court or a judge may direct that the amount for which final judgment is to be signed shall be ascertained by one of the masters of the said Court" (*c*). Where the damages are wholly unliquidated, a writ of inquiry is necessary.

Notice to plaintiff to try.

It may, however, happen that, although the defendant is ready, the plaintiff fails to bring on his case for trial. This contingency is met by the 101st section of the First

(*u*) As to the writ of trial, and when it may issue, see 3 & 4 Will. 4, c. 42, ss. 17—19.

(*x*) This notice is frequently given on the back of the "issue," which is a copy of the entire pleadings made by the plaintiff—the form of which may be seen, Pr. R. Schod. No. 1. It should correspond with the record: *Worthington* v. *Wigley*, 5 Dowl. 210.

(*y*) Sects. 97—99.

(*z*) Rr. 34—43.

(*a*) C. L. Proc. Act, 1852, s. 93.

(*b*) A "writ of inquiry" is usually directed to the sheriff of the county in which the venue in the action is laid. It states the former proceedings in the action, and "because it is unknown what damages the plaintiff hath sustained," it commands the sheriff by a jury to inquire the same, and return the inquisition into Court.

(*c*) C. L. Proc. Act, 1852, s. 94.

Common Law Procedure Act, by which a defendant may, after the lapse of a certain period therein more particularly defined, give the plaintiff *twenty* days notice to bring on the issues to be tried at the next sittings or assizes, and if he shall neglect to do so, the defendant may sign judgment for his costs (*d*); or after default by the plaintiff in proceeding to trial, the defendant may take the cause down to trial (*e*), giving the plaintiff *due notice thereof.*

Before the subject of the pleading in an action is dismissed, it will be necessary to refer to certain statutory provisions, which may materially affect the conduct of the suit before it comes to trial. Allusion is here made particularly to those clauses in the Second Common Law Procedure Act, by which *discovery* and *interrogatories* have been introduced into the practice of the common law (*f*). The result of the provisions in question may be thus briefly stated:—

Discovery.

1. The Court or a judge may, upon the application founded on a sufficient affidavit of either party, order that his opponent shall state—also on affidavit—what documents relating to the matters in dispute are in his possession, power, or knowledge; and further, that—if he objects to produce any such documents—he shall state the grounds of his objection (*g*).

(*d*) See also R. Pr., reg. 58; *Farthing* v. *Castles*, 1 Bail C. Ca. 142; *Judkins* v. *Atherton*, 3 E. & B. 987; *Morgan* v. *Jones*, 8 Exch. 128; *Truscott* v. *Latour*, 9 Exch. 420; *Hall* v. *Scotson*, Id. 238; see *Haddrick* v. *Heslop*, 12 Q. B. 267. As to signing judgment of nonsuit, see argument in *Taylor* v. *Nesfield*, 4 E. & B. 467.

(*e*) This is called trial by proviso. See C. L. Proc. Act, 1852, s. 116; R. Pr., reg. 42; 2 Wms. Saund. 336 a, n. (*b*).

(*f*) Why the proceedings mentioned in the text were thus borrowed from Courts of equity, is set forth in the Common Law Commissioners' 2nd Report. The principles followed in Courts of equity in regard to discovery will be found ably treated of in Wigram's Points in the Law of Discovery.

(*g*) C. L. Proc. Act, 1854, s. 50; *Forshaw* v. *Lewis*, 10 Exch. 712.

Inspection of documents.

2. When any document of this nature is in the hands of either party—and is shewn to be there either by the means just specified, or in any other mode which is satisfactory to the Court—it may order that an inspection of it may be had, and (if necessary) a copy be made of it by the opposing party in all cases in which, previous to the passing of the 14 & 15 Vict. c. 99, he might have obtained a discovery by filing a bill, or by any other proceeding in a Court of equity (*k*).

Interrogatories.

3. The Court or judge may, in certain cases, order the plaintiff with his declaration, or the defendant with his plea (or either of them at any other stage of the suit, by leave granted by the Court or a judge) to deliver to the opposite party (if liable to be called as a witness) interrogatories in writing upon the matters relating to the action as to which discovery may be sought, and these interrogatories must be answered on affidavit; and further, the Court or judge may order an *oral* examination, before a judge or master, of any party whose affidavit appears insufficient. The application for an order to exhibit interrogatories must be founded upon an affidavit of the party proposing to interrogate, and of his attorney or agent. Such affidavit (or affidavits) must generally state that the party interrogating "will derive material benefit" from the discovery which he seeks, and "that there is a good cause of action or defence upon the merits." And if the application is made on the part of the defendant, it must further state, "that the discovery is not

(*k*) See 14 & 15 Vict. c. 99, s. 6; *Riccard* v. *The Inclosure Commissioners, &c.*, 24 L. J., Q. B., 49. Until the passing of the 2nd Common Law Procedure Act, the above provision was available in comparatively few cases. See *Hunt* v. *Hewett*, 7 Exch. 236; *Rayner* v. *Allhusen*, 2 L. M. & P. 605; and C. L. Com. 2nd Rep. pp. 34, 35. As to the right of inspection, independently of the statute, see *Bluck* v. *Gompertz*, 7 Exch. 70, 71.

sought for the purpose of delay" (*h*). The cases cited in the notes will shew how these several enactments have been hitherto limited in practice.

Previous to the trial, the important duty devolves upon the litigants of preparing evidence in support of the case upon which each intends to rely. This will be either documentary or oral. Documentary evidence may be adduced at the trial either on admission or by proof. Either party may call on the other "by notice (*l*) to admit any document, saving all just exceptions; and, in case of refusal or neglect to admit, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless at the trial the judge shall certify that the refusal to admit was reasonable;" and no costs of proving any document shall be allowed in general, unless such notice be given.

Evidence.

—documentary.

If a document be not admitted it must be proved; unless—as in the case of a deed thirty years old—it proves itself (*m*); and it is now unnecessary to call the attesting witness to prove "any instrument, to the validity of which attestation is not requisite, and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto" (*n*). Should any document

—by admission.

(*h*) C. L. Proc. Act, 1854, sects. 51—57; *Scott* v. *Zygomala*, 4 E. & B. 483; *Wright* v. *Morrey*, 24 L. J., Exch., 259; *Martin* v. *Hemming*, 10 Exch. 478; *Thöl* v. *Leask*, Id. 704; *Osborn* v. *London Dock Company*, 10 Exch. 698; *May* v. *Hawkins*, 24 L. J., Exch., 309; *Whateley* v. *Crawford*, *Carew* v. *Davis*, Q. B. Mich. T. 1855; *Pohl* v. *Young*, Bail Ct. Id. Refusing to answer or insufficiently answering interrogatories is punishable as a contempt of Court by attachment, as to which see *Curran* v. *Elphinstone*, Mich. T. 1855, Q. B.

(*l*) C. L. Proc. Act, 1852, s. 117. See form of notice to admit Pr. R. reg. 29.

(*m*) Taylor on Evidence, 2nd edit., p. 93.

(*n*) C. L. Proc. Act, 1854, s. 26.

required for evidence by either party be in the possession of his adversary, notice should be given him to produce it (*o*). If, again, it be in the hands of a third party, its production may be enforced by a *subpœna duces tecum.*

Attendance of witnesses.

The attendance of a witness to give oral evidence is procured by serving him with a subpœna ad testificandum. The mode of doing this and the liability of witnesses neglecting to attend when duly summoned, will be found stated in Books of Practice, to which the reader must here be referred. It should, however, be noticed, that, if a witness is unable to attend personally, provision has been made by statute for his examination upon interrogatories or otherwise (*p*). When the inability to attend arises by reason of the residence of the witness in India or the British colonies, he may be examined where he resides by the local tribunals (a writ "in the nature of a mandamus" having been issued to them for that purpose (*q*)), or by a commission appointed by the Court or a judge where the suit is pending (*r*). The latter mode of examination under a commission may be ordered, indeed, and pursued, in respect of other places *out* of the jurisdiction of the Court, besides those just referred to; and if witnesses are *within* its jurisdiction a commission may also be thus employed, when it seems to the Court or a judge that the circumstances of the case justify such a course. The depositions, having been taken, are filed in the Master's Office (*s*), and become a

(*o*) See Chitt. Pr. 9th edit., p. 293.

(*p*) 1 Will. 4, c. 22, s. 1, extending 13 Geo. 3, c. 63; C. L. Proc. Act, 1854, ss. 51—57. As to the effect of the latter stat. on this subject, see *Pohl* v. *Young*, B. C. Mich. T. 1855, cor. *Erle*, J.

(*q*) 13 G. 3, c. 63, and 1 W. 4, c. 22.

(*r*) 1 Will. 4, c. 22, s. 4; and see Chit. Pr., 9th edit., p. 300—303; where also the mode of framing the interrogatories and conducting the examination will be found explained.

(*s*) Pr. R., reg. 33.

record of the Court, and may be read at the trial as evidence in the cause.

Record.

The Nisi Prius record, which is a copy of the issue (*t*), must also be made up before going to trial. This is the authentic account of the suit up to the date of the trial, by which alone the judge can be guided as to the questions in dispute, and it must be duly "delivered to the proper officer of the Court in which the cause is to be tried" (*u*). Assuming that all preliminaries (some of which it is not necessary here to describe) have been performed, the cause is set down, and will be duly called on, in its proper turn, for trial at Nisi Prius (*x*).

4. *The Trial at Nisi Prius.*

The jury summoned to try the cause are sworn to give their verdict according to the evidence, and either party has at this juncture the opportunity afforded him of challenging either to the array or to the poll (*y*).

Opening the case.

The jury being sworn, the case is opened by the plaintiff or defendant (as may be) in person or by counsel making a statement as well of the purport of the pleadings on the record as of the evidence which it is proposed to offer in support of them. The right to begin devolves most commonly upon the plaintiff, in virtue of the rule that he on whom the burden of making out the affirmative of the issue lies—in other words, the party against whom, if no evidence were offered on either side, the verdict would pass (*z*),—is entitled to begin.

Assuming that the plaintiff begins, and that the case

(*t*) Ante, p. 215, n. (*x*).

(*u*) C. L. Proc. Act, 1852, s. 102; and see Sched. to Pr. R. No. 2.

(*x*) *Cottam* v. *Banks*, 1 Bail Ct. Rep. 302.

(*y*) As to the different modes of challenging, see 1 Chit. Archb. Pr. 9th edit., pp. 402—407; 3 Bla. Com. p. 358.

(*z*) *Huckman* v. *Fernie*, 3 M. & W. 505; C. L. Com. 2nd Rep. p. 18.

has been duly opened, his counsel calls evidence in its support, which is then summed up by a second address to the jury (*a*), unless it be previously announced that evidence is to be offered on the other side. In this latter event, the second speech of plaintiff's counsel is deferred until the evidence thus announced has been laid before the Court, and summed up by the defendant's counsel. Thus it will be perceived that where evidence is offered for the defendant, the party beginning has the general reply—that is, the opportunity afforded him of commenting on the whole case, as well on his own evidence as on that of his opponent.

Order of proceedings.

The evidence on behalf of the defendant is in like manner first stated by counsel, then adduced, and afterwards summed up by him in his turn, although of course if he do not offer any, his sole duty will be to comment on the evidence of the other side (*b*).

Province of the Judge.

During the trial, it is within the province of the presiding judge to rule as to (or to reserve for future consideration) all questions of law which present themselves (*c*). Upon him devolves the duty of deciding as to the admissibility of evidence, the allowing of amendments in the record (*d*), permitting adjournments of the trial (*e*), adding pleas (*f*), and various other matters which may incidentally

(*a*) "The Judge is to decide whether there is evidence to go to the jury. If he decides that there is none, there is nothing to sum up." Per *Martin*, B., *Hodges* v. *Ancrum*, 24 L. J., Exch., 257.

(*b*) C. L. Proc. Act, 1854, s. 18.

(*c*) Leg. Max., 2nd ed., p. 77.

(*d*) C. L. Proc. Act, 1852, s. 222; C. L. Proc. Act, 1854, s. 96; *Morgan* v. *Pike*, 14 C. B. 473; *Wilkin* v. *Reed*, 15 C. B. 192; *Ritchie* v. *Van Gelder*, 9 Exch. 762; *Buckland* v. *Read*, 15 C. B. 145; *Edwards* v. *Hodges*, 24 L. J., C. P., 121; per *Pollock*, C. B., *Emery* v. *Webster*, 9 Exch. 246.

As to amendments upon a trial by record, see *Noble* v. *Chapman*, 14 C. B. 400; *Hunter* v. *Emanuel*, 15 C. B. 290.

(*e*) C. L. Proc. Act, 1854, s. 19.

(*f*) *Mitchell* v. *Crassweller*, 13 C. B. 237.

occur in the course of the cause. It remains, further, for the Judge to 'sum up' and explain to the jury the whole of the evidence which has been adduced, with a view to their delivering their verdict on the issue or issues presented by the record for their determination.

Province of jury.

Although in theory it is the office of the jury to deliver their verdict on all the issues of fact raised by the pleadings, yet in practice, where these issues are numerous, or the evidence before the Court is complicated and difficult in its legal application, the direction of the judge will not only assist the jury in the elucidation of the connection between the evidence offered and specific issues, but it will virtually determine—as indeed it ought to do—how these latter are to be found and entered on the record. That the jury may persist in finding any issue contrary to the expressed opinion and direction of the judge is undoubtedly true; but if this should subsequently be made apparent (in a mode which will be presently explained) to the Court in banc, their verdict might be set aside as being against evidence, or perverse. The jury, however, are usually content to exercise the discretionary power confided to them, subject to and in accordance with the advice or suggestions proffered by the judge.

Special verdict.

Another important point to be here noticed is, that, under the direction of the judge, the jury may return a special verdict, by which the facts of the case are found, and it is left for the Court subsequently to pronounce as to their legal effect and signification.

Directing and reserving leave to enter verdict or nonsuit.

Again, as in the exercise of his authority to rule on matters of law at the trial, the judge frequently directs a nonsuit or a verdict for either party to be entered, without calling on the jury to interfere; so he may reserve for the

consideration of the Court in banc a point which, if then decided by him, would determine the verdict (*g*). To do this, the consent of the party in whose favour the opinion of the Judge inclines, must be obtained; but if the other side have leave to bring the question subsequently for argument before the Court, then, according to the determination of the latter tribunal thereon (who deal with it as the judge at Nisi Prius *might* have dealt with it had he been so pleased), the verdict or nonsuit will, according to leave reserved, be entered or set aside (*h*). A 'nonsuit,' just alluded to, occurs when a plaintiff withdraws (*i*) from the contention at Nisi Prius, either because he is satisfied that he cannot then support his case, or upon the judge expressing his opinion (*j*) that the action is not maintainable. It remains, indeed, notwithstanding the opinion so judicially expressed, within the discretion of the plaintiff himself, to submit to be nonsuited (*k*)—a course, however, which it will in general be prudent to adopt, inasmuch as if the verdict, in deference to the judge's direction to the jury, be against him, his right of action would be barred; but should he be only nonsuited, he may re-assert his claim at some future time.

Nonsuit.

(*g*) See *Siordet* v. *Kucynski*, C. P. Mich. T. 1855, 4 W. Rep. 153; *Eames* v. *Smith*, 1 Jur. N. S. 1025.

(*h*) As to carrying the decision of the Court into error, see C. L. Proc. Act, 1854, s. 34. Only those points made at the trial can be argued either on appeal or in the Court below: per *Coleridge*, J., and *Williams*, J., *Cuthbert* v. *Cummings*, 3 W. Rep, Exch., 534.

(*i*) "At common law, the subject has a right to be nonsuited at any stage of the proceedings he may please, and thereby to reserve to himself the power of bringing a fresh action for the same subject-matter:" per *Parke*, B., *Outhwaite* v. *Hudson*, 7 Exch. 381.

(*j*) *Harman* v. *Johnson*, 3 Car. & K. 272; *Briers* v. *Rust*, 3 Car. & K. 294. See *Hutchins* v. *Hollingworth*, 7 Moo. P. C. C. 228.

(*k*) See *Alexander* v. *Barker*, 2 C. & J. 133; *Corsar* v. *Reed*, 17 Q. B. 540; Per *Parke*, B., *Stancliffe* v. *Clarke*, 7 Exch. 446.

Bill of exceptions.

Further, a bill of exceptions may be tendered at the trial to the Judge by either side, if dissatisfied with his direction in point of law to the jury, or with his ruling as to the admissibility and legal effect of evidence in the case. This bill of exceptions, when tendered, the Judge is bound to seal (*l*), that the matter therein stated (having been first attached to the record, and thus made part of it) may be submitted to a Court of error (*m*).

Certificate as to costs.

To the Judge also appertains the duty of granting or withholding in certain cases his certificate as to costs; the effect of which under various provisions of the County Court Acts has been already adverted to (*n*). Other statutes also, under certain circumstances, impose upon a successful plaintiff the necessity of obtaining from the Judge at Nisi Prius a certificate, to enable him to recover costs. Of such statutes, some of the more important are below cited (*o*). It may be remembered, also, that the extra costs of trial by a special jury (*p*) are thrown upon the party applying for it, whatever the verdict may be, unless the Judge certifies that the case was one suitable to be so tried.

Jury discharged, when.

Further, it is within the discretion of a Judge at Nisi Prius, under particular circumstances, to discharge the jury from giving any verdict, as where they cannot agree therein, and the Judge sees fit to excuse their so doing—the bar-

(*l*) *Black* v. *Jones*, 6 Exch. 213. See *Newton* v. *Boodle*, 3 C. B. 795; *Earl of Glasgow* v. *Hurlet and Campsie Alum Co.* 3 H. L. Cas. 25.

(*m*) 13 Edw. 1, c. 31, s. 11; *Money* v. *Leach*, 3 Burr. 1742. See also C. L. Proc. Act, 1854, ss. 34—42.

(*n*) Ante, p. 72.

(*o*) See 3 & 4 Vict. c. 24, s. 2; 7 & 8 Geo. 4, c. 29, s. 75; 7 & 8 Geo. 4, c. 30, s. 41; 10 Geo. 4, c. 44, s. 41; 16 & 17 Vict. c. 107, ss. 313—322. See also Gray on Costs, chaps. i. and viii.—xiv.

(*p*) As to trying by a special jury, see Pr. R. rr. 44—47; C. L. Proc. Act, 1852, ss. 104—115; C. L. Proc. Act, 1854, ss. 58, 59.

barous alternative being, to compel unanimity by keeping them in duress "without meat, drink, or fire—candle-light only excepted" (q).

Signing judgment.

The verdict, having with the judicial assistance above indicated been delivered, is by the associate shortly minuted on the back of the record (r), after which the successful party (if not prevented by proceedings presently to be noticed) will be entitled to sign judgment (s), with a view to issuing execution thereon. And with respect to the time within which these steps may be taken, it is enacted, that "when a plaintiff or defendant has obtained a verdict in term, or in case a plaintiff has been nonsuited at the trial in or out of term, judgment may be signed and execution issued thereon in fourteen days, unless the Judge who tries the cause, or some other Judge or the Court, shall order execution to issue at an earlier or later period, with or without terms" (t).

Execution.

Execution is founded upon a record, and is levied under the authority of a writ issued out of the Court in which the record is (u), and directed to the sheriff of the county wherein it is to be executed, the object being to obtain thereby, either directly or indirectly, satisfaction of the debt or damages for which judgment has been signed (x).

(q) See C. L. Com. 2nd Rep., pp. 6—8.

A juror is sometimes withdrawn by the consent of both parties.

As to the effect of withdrawing a juror, see per *Pollock*, C. B., *Gibbs* v. *Ralph*, 14 M. & W. 805; Per Lord *Abinger*, C. B., *Harries* v. *Thomas*, 2 M. & W. 37—38.

(r) This, when formally drawn up and indorsed on the record, is called the *Postea*.

(s) When the costs are taxed and inserted on the *Postea*, the final judgment is said to be signed: 1 Chit. Prac. 9th edit., p. 484. This is done by the Master affixing an official seal to the *Postea*: Id. p. 486.

(t) Pr. R. r. 57; C. L. Proc. Act, 1852, s. 120.

(u) 2 Wm. Saund. 37 a (2).

(x) C. L. Proc. Act, 1852, s. 121.

The ordinary writs of execution are, 1. Fieri Facias; 2. Elegit; 3. Capias and satisfaciendum.

Fieri facias.

1. The writ of *fieri facias* commands the sheriff to cause to be made, of the goods of the judgment debtor, the sum recovered in the action, together with interest thereon from the date of the judgment being entered; and on the return day of the writ to have the same in court, together with the writ and the manner in which it has been executed (*y*). Under this writ, the sheriff may seize *all the goods and chattels*, moneys, notes, cheques, bills, specialties, and securities for money belonging to the defendant at the time of the writ being delivered to the sheriff, with the exception of wearing apparel (*z*), and (in a qualified degree) certain agricultural produce (*a*); the levy of goods and chattels, moreover, being made subject to the claim (if any) of the landlord of the judgment debtor for a year's rent (*b*), and to some other claims which need not here be particularised.

Elegit.

2. The writ of *elegit* has been much extended in its operation by the 1 & 2 Vict. c. 110 (*c*). It is employed to obtain satisfaction from the *land* as well as the *goods* of the judgment debtor, as may be seen from the form (*d*) of the writ, which recites the recovery of the judgment debt, and that the judgment creditor "chose to be delivered to him all the

(*y*) See forms of the writ in Sched. to Pr. R. Nos. 1—6.

(*z*) See 8 & 9 Vict. c. 127, s. 8; 1 & 2 Vict. c. 110, s. 12. As to attachment of debts, see C. L. Proc. Act, 1854, ss. 61—67; *Johnson* v. *Diamond*, 11 Exch. 73; *Holmes* v. *Tutton*, 24 L. J., Q. B., 346; *Baynard* v. *Simmons*, Id. 253.

(*a*) 56 Geo. 3, c. 50; and see 14 & 15 Vict. c. 25, s. 2. As to property of bankrupts, see 12 & 13 Vict. c. 106.

(*b*) 8 Ann. c. 14.

(*c*) This writ was first given by 13 Edw. 1, c. 18. The 29 Car. 2, c. 3, subsequently enlarged the effect of the above statute. See generally, as to the writ of elegit, the notes to *Underhill* v. *Devereux*, 2 Wm. Saund. 68.

(*d*) See Pr. R. Sched. Nos. 9—14

goods and chattels" of the judgment debtor in the sheriff's bailiwick,—"except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments," including those of copyhold tenure, as the said judgment debtor, (or any trustee on his behalf,) is in possession of or has disposing power over to exercise for his own benefit—on the day when the judgment was entered up or any time afterwards, until the debt and interest thereon should be liquidated; and the writ then commands the sheriff to cause the above-mentioned goods and chattels to be delivered to the creditor at a reasonable price, and also *all* (*e*) the lands, &c. referred to in the writ (*f*).

As regards the goods and chattels upon which execution is to be levied under a writ of elegit, a jury must be empannelled to make inquisition of and appraise them; and if their value be insufficient, then the lands are delivered over by the sheriff to the execution creditor (*g*). The writ, with the inquisition, is then returned to the Court out of which it issued.

Capias ad satisfaciendum

3. The writ of *capias ad satisfaciendum* (*h*) commands the sheriff to take the *body* of the judgment debtor, and him safely keep, to satisfy the creditor the amount of the judgment debt. This mode of execution cannot be enforced when the judgment debt does not exceed 20*l.* exclusive of costs (*i*). It must, however, be borne in mind that cer-

(*e*) Before the 1 & 2 Vict. c. 110, only a moiety of the debtor's land was thus subject to execution. Estates tail, trust, and other estates were also not liable under the writ of elegit, see 2 Wms. Saund. 11 (17).

(*f*) As to how the writ of elegit affects property purchased or mortgaged without notice, see 2 & 3 Vict. c. 11.

(*g*) 2 Wms. Saund. 68 *g*.

(*h*) See the forms of the writ in Sched. to Pr. R. 15—22.

(*i*) 7 & 8 Vict. c. 96, s. 57. See 2 Wms. Saund. 68 *b*.

tain classes of persons are privileged from arrest under this process (*i*).

Besides the above ordinary writs of execution, some others less frequent in practice must be enumerated.

Levari facias

The writ of *levari facias* issues with a view to obtaining satisfaction of the judgment debt out of the lands and chattels of the judgment debtor. Except in the case of outlawry, however, this writ has been almost wholly superseded by that of elegit, and it need not therefore here be further noticed.

Extent.

The writ of *extent* is issued for the purpose of enforcing execution on behalf of the Crown. The practice and learning in regard to it, which cannot here be discussed, may be collected from the authorities below cited (*k*).

Execution upon revived judgment.

At any time within six years from the recovery of a judgment in a personal action, if the parties thereto are living, execution may issue thereon (*l*). "By reason either of lapse of time," however, "or of a change by death or otherwise of the parties entitled or liable to execution" (*m*), a revival of the judgment, before execution can issue upon it, becomes necessary, and such revival may be effected under the provision of the First Common Law Procedure Act (*m*) by writ of error or by suggestion made upon the roll.

When execution has been levied in any of the modes above indicated—and its validity remains unquestioned—the final results of a personal action are, so far as may be practicable, attained, and the ordinary procedure therein is brought to a close.

(*i*) As to privilege, see 1 Chitt. Archb. Pr. 9th edit., pp. 637—642.

(*k*) See *Edwards* v *Rex* (in error), 9 Exch 628; *S. C.*, Id. 32; 3 Ma Com. p. 420; West on Extents. Manning Exch. Pr. Bk. 1.

(*l*) C L Proc. Act, 1852, s. 128.

(*m*) Id ss. 128- 131

5. Proceedings by Motion or in Error, subsequent to Verdict.

New trial.

If either plaintiff or defendant in an action is dissatisfied with the result of the trial, it is competent to him to move for a new trial, a rule absolute for which may be granted by the Court on any one of the following grounds:—if evidence material to the verdict during the progress of the trial was either improperly received or rejected (*n*); as if the judge misdirected (*o*) the jury or omitted to direct them at all (*p*) on some point of law relative to the case; if the successful party (*q*), or officer of the Court (*r*), or the jury (*s*) have been guilty of gross misconduct; if a mistake have been made in entering the verdict (*t*); or if the damages awarded by the jury be glaringly excessive (*u*) or palpably insufficient (*x*). It is also deemed good ground for

(*n*) *Doe* d. *Welsh* v. *Langfield*, 16 M. & W. 497; *Hughes* v. *Hughes*, 15 M. & W. 701; *Crease* v. *Barrett*, 1 Cr. M. & R. 909. See *Cattlin* v. *Barker*, 5 C. B. 201; *Ferrand* v. *Milligan*, 7 Q. B. 730; *Bosanquet* v. *Shortridge*, 4 Exch. 699; *Stindt* v. *Roberts*, 5 D. & L. 460.

(*o*) Per *Maule*, J., *East Anglian R. C.* v. *Lythgoe*, 10 C. B. 726; Per *Parke*, B., *Pennell* v. *Aston*, 14 M. & W. 415; *Huckman* v. *Fernie*, 3 M. & W. 505; *Elliott* v. *South Devon R. C.* 2 Exch. 725: see *Clarke* v. *Arden*, 16 C. B. 227. See per *Mansfield*, C. J., *Fentum* v. *Pocock*, 5 Taunt. 195, 196.

As to new trial on the ground of improperly directing a nonsuit, see per Lord *Lyndhurst*, C. B., *Alexander* v. *Barker*, 2 Cr. & J. 133.

(*p*) *Hadley* v. *Baxendale*, 9 Exch. 341. See *Robinson* v. *Gleadow*, 5 Bing. N. C. 156.

(*q*) *Coster* v. *Merest*, 2 B. & B. 272.

(*r*) *Bentley* v. *Fleming*, 3 D. & L. 23.

(*s*) *Straker* v. *Graham*, 4 M. & W. 721; per Lord *Abinger*, C. B., *Morris* v. *Vivian*, 10 M. & W. 140. See *Standewick* v. *Hopkins*, 2 D. & L. 502; *Ramadge* v. *Ryan*, 9 Bing. 333; *Hall* v. *Poyser*, 13 M. & W. 600; *Allum* v. *Boultbee*, 9 Exch. 738; *Vasie* v. *Delaval*, 1 T. R. 11. See *Cooling* v. *Great Northern R. C.*, 15 Q. B. 486.

(*t*) *Roberts* v. *Hughes*, 7 M. & W. 399.

(*u*) *Creed* v. *Fisher*, 9 Exch. 472. See *Masters* v. *Barnwell*, 7 Bing. 224; *Price* v. *Severn*, 7 Bing. 316, and cases there cited; *Rolin* v. *Steward*, 14 C. B. 395.

(*x*) *Richards* v. *Rose*, 9 Exch. 218; *Chambers* v. *Caulfield*, 6 East, 244. See *Apps* v. *Day*, 14 C. B. 112.

requiring that the issues should be submitted to another jury, if it is made out that the verdict was obtained by 'surprise' (*y*), or that new evidence, discovered subsequent to the trial, is now available to the applicant, or that the verdict was procured and obtained by perjury and conspiracy (*z*), or was manifestly against the weight of evidence, or was perverse (*a*): and generally (*b*), upon satisfying the Court that there has been a miscarriage of justice remediable by a new trial, it will be granted to the applicant who moves for it in time (*c*) either absolutely or upon such conditions as may seem equitable. It must always, however, be remembered, that whilst it is a principle with our Courts that failure of justice should be corrected and its perfect administration be secured (*d*), yet another important object, which legal tribunals must not lose sight of, "is that causes should be determined and determined finally" (*e*).

Appeal on motion for a new trial.

Important provisions with respect to motions for new

(*y*) *Hoare* v. *Silverlock*, 19 L. J., C. P., 215; *Austin* v. *Evans*, 2 M. & Gr. 430; *Edger* v. *Knapp*, 5 M. & Gr. 753.

(*z*) *Thurtell* v. *Beaumont*, 1 Bing. 339.

(*a*) *Gurney* v. *Womersley*, 24 L. J., Q. B., 47; *Harrison* v. *Fane*, 1 M. & Gr. 550; *Honeyman* v. *Lewis*, 23 L. J., Exch., 204. See C. L. Proc. Act, 1854, s. 1, ad fin.

(*b*) *Williams* v. *Evans*, 2 M. & W. 220; *Allum* v. *Boultbee*, 9 Exch. 738; *Honeyman* v. *Lewis*, ubi sup.; *Fox* v. *Clifton*, 9 Bing. 115; *Benett* v. *The Peninsular and Oriental Steam Boat Co.*, 16 C. B. 29; C. L. Proc. Act, 1854, s. 31.

(*c*) Pr. R. reg. 50—54; *Harrison* v. *Great Northern R. C.*, 11 C. B. 542; *Watkins* v. *Packman*, 14 C. B. 419; *Black* v. *Jones*, 6 Exch. 213.

As to costs of a new trial, see C. L. Proc. Act, 1854, s. 44; *Evans* v. *Robinson*, 11 Exch. 40. Thus *Alderson*, B., says in *Hughes* v. *Hughes*, 15 M. & W. 704: "The granting a new trial, *strictly speaking*, is in the discretion of the Court: although the Court regulates its discretion as nearly as possible by the rules applicable to bills of exceptions." But see C. L. Proc. Act, 1854, s. 35.

(*d*) See per Lord *Kenyon*, C. J., *Calcraft* v. *Gibbs*, 5 T. R. 19; Per *Mansfield*, C. J., *Swinnerton* v. *Marquis of Stafford*, 3 Taunt. 232; *Gibson* v. *Muskett*, 4 M. & Gr. 160, 171.

(*e*) Per *Willes*, J., *Great Northern R. C.* v. *Mossop*, C. P., Mich. T. 1855, citing the maxim, *ne lites immortales dum litigantes mortales.*

trials have been introduced by the Second Common Law Procedure Act (*f*), which inter alia enacts that upon the hearing of the motion the Court may direct oral examination of witnesses and other evidence to be produced (*g*), and an appeal is given in certain cases from the ruling of the judges sitting in banc (*g*); but with respect to this right of appeal, it does not extend to cases where the motion has been made on grounds as to which it is a matter of discretion only with the Court to grant a new trial or not, as, for example, that the verdict was against the weight of evidence (*g*). Further, whenever a Court of Appeal may be thus referred to, it may give such judgment as ought to have been given in the Court below, and may adjudge payment of costs, and order restitution (*h*).

When the rule for a new trial is applied for, the motion is frequently conjoined with one to enter a verdict or nonsuit pursuant to leave reserved by the judge (*i*) at the trial; for the Court will sometimes see fit to grant the former in preference to allowing the latter course to be taken.

Venire de novo.

The object of moving for a venire or trial de novo (*k*) is the same as that of moving for a new trial. An important distinction, however, between an award of a venire de novo and a rule for a new trial appears to be, that the former is always founded upon some irregularity or miscarriage apparent *upon the face of the record*, whilst the latter is more commonly an interference by the Court in the discretionary exercise by it of a species of equitable jurisdiction for the pur-

(*f*) Sects. 31—33, 42—44, 45; Pr. R. rr. 50—54. See *Drayson* v. *Andrews*, 10 Exch. 472; *Gurney* v. *Womersley*, Q. B., Mich. T., 1854, 3 W. Rep. 61; *Evans* v. *Robinson*, 24 L. J., Exch., 212.

(*g*) C. L. Proc. Act, 1854, ss. 46—49. The above power applies to "any motion or summons." As to affidavits in answer, see s. 45.

(*h*) Id. ss. 41, 42.

(*i*) Ante, p. 223.

(*k*) C. L. Proc. Act, 1852, s. 105.

pose of relieving a party against a *latent* grievance (*l*). Thus, when claimable at all, a venire de novo can be claimed of right and unconditionally, as if it appears on the record that challenges to the jury have been improperly allowed or disallowed (*m*), or that the verdict is in itself imperfect (*n*), or when the damages are wrongly given with reference to the breaches alleged (*o*), or when a mis-trial has occurred by a wrong person being placed on the jury at the trial of the cause (*p*).

A trial de novo may also issue from a Court of error if its decision on a bill of exceptions (*q*) is in favour of the party who has tendered the bill, and error may now at once be brought "upon an award of a trial de novo by any one of the superior Courts, or by the Court of error" (*r*).

Although the result of the trial be not disturbed by any of the proceedings already indicated, the successful plaintiff is not altogether sure of enjoying the fruits of his success. There yet remains to the defendant an opportunity of moving in *arrest of judgment;* whilst the plaintiff (*s*), on his part, if his adversary has secured the verdict at the trial, may apply to the Court for judgment *non obstante veredicto;* resort to a Court of error being also open to the defeated party.

Arrest of judgment.

Judgment will be arrested, when, upon the face of the

(*l*) *Gould* v. *Oliver*, 2 M. & Gr. 238; Per *Alderson*, B., *Hughes* v. *Hughes*, 15 M. & W. 704; but see *Dovey* v. *Hobson*, 6 Taunt. 460.

(*m*) *R.* v. *Edmonds*, 4 B. & Ald. 471.

(*n*) *Witham* v. *Lewis*, 1. Wils. 48.

(*o*) *Leach* v. *Thomas*, 2 M. & W. 427; *Gould* v. *Oliver*, ubi sup. n. (*l*); *Emblin* v. *Dartnell*. 12 M. & W. 830.

(*p*) *Doe* d. *Ashburnham* v. *Michael*, 16 Q. B. 624; *Muirhead* v. *Evans*, 6 Exch. 447.

(*q*) Ante, p. 225.

(*r*) C. L. Proc. Act, 1854, s. 43. See Pl. R. r. 24.

(*s*) *Rand* v. *Vaughan*, 1 Bing., N. C., 767; *Reg.* v. *Darlington School*, 6 Q. B. 682.

record it appears to the Court that the plaintiff has no right to recover.

Judgment non obstante veredicto.

Judgment *non obstante veredicto*, on the other hand, is given by the Court where the defendant, by his pleading, has confessed the cause of action, whilst the matter which he has pleaded in avoidance is insufficient for the purpose (*t*). But if either plaintiff or defendant move the Court in the manner just specified, it is now competent "for the party, whose pleading is alleged to be defective, by leave of the Court, to *suggest* the existence of the omitted fact or facts, or other matter, which, if true, would remedy" (*u*) the defects, and the suggestion may then be pleaded to and tried in like manner as the issue in an ordinary action (*x*).

Proceedings in error.

The proceeding to error is now a "step in the cause" (*y*), brought with a view to reversing the judgment previously entered up, and must be taken according to the provisions of the Common Law Procedure Acts (*z*). Error is either in law or in fact:—

Error in law.

Error in law may be maintained (*a*), if, on the face of the record the judgment appears not to be the legal con-

(*t*) As to when judgment non obstante and repleader are respectively appropriate, see per *Abbott*, C. J., *Lambert* v. *Taylor*, 4 B. & Cr. 152; ante, p. 179.

(*u*) C. L. Proc. Act, 1852, s. 143; *Manley* v. *Boycot*, 2 E. & B. 46; *Fisher* v. *Bridges*, 2 E. & B. 120.

(*x*) See the C. L. Proc. Act, 1852, ss. 144, 145; Pr. R. r. 50.

(*y*) C. L. Proc. Act, 1852, s. 148. By this section the *writ* of error is abolished. "Error," says Lord Coke, "lieth whena man is grieved by any error in the foundation, proceeding, judgment, or execution. . . But without a judgment, or an award in the nature of a judgment, no writ of error doth lie . . . and that judgment must regularly be given by Judges of record, and in a Court of record:" Co. Litt. 288. b.

(*z*) C. L. Proc. Act, 1852, ss. 146—167; C. L. Proc. Act, 1854, ss. 32, 36, 43. See Pr. R. rr. 64—69.

(*a*) As to the Court in which error is to be tried, see 11 Geo. 4 & Will. 4, c. 70; 1 Chitt. Pr., 9th ed.,

sequence of the pleadings—as where the declaration (*c*), by reason of any substantial defect therein, is insufficient to support the action; or, again, if the proceedings in other respects are shewn on the face of the record to be erroneous—as where the execution awarded is not the legal consequence of the judgment, or where the cause below was *coram non judice* (*d*).

Error in fact.

Error in fact must be substantiated by affidavit (*e*) shewing that the party against whom the judgment has been given was not properly before the Court—as, for instance, that, being an infant, he appeared by attorney (*f*).

If the grounds of error "appear frivolous, the Court or a judge upon summons may order execution to issue" (*h*); and if the proceedings in error are taken contrary to the agreement of parties (*i*) or against good faith, or in any case where they will not properly lie (*k*), a Court of error has power to quash them. Execution will not be "stayed or delayed by proceedings in error or supersedeas thereupon without the special order" of the Court or a judge, unless sufficient bail be given by the appellant as security to his adversary to prosecute the proceedings in error with

p. 509. The ultimate Court of appeal is the House of Lords.

The proceedings in error must be brought generally within six years after judgment is signed: C. L. Proc. Act, 1852, ss. 146, 147.

(*c*) When the declaration is insufficient to maintain the action, the error is called *common;* in other cases it is called *special* error.

(*d*) As to where error may be assigned instead of suggested and the mode of pleading, see C. L. Proc. Act, 1852, s. 152, ad fin.

(*e*) C. L. Proc. Act, 1852, s. 158.

(*f*) *Jackson* v. *Marshall*, 24 L. J., Q. B., 143.

(*h*) C. L. Proc. Act, 1852, s. 150. See R. Pl. r. 27.

(*i*) *Garrard* v. *Tuck*, 8 C. B. 258.

(*k*) C. L. Proc. Act, 1852, s. 156. 1 Chit. Prac., 9th edit., p. 512. *Alleyne* v. *Reg.*, 24 L. J., Q. B., 282.

effect, and also to satisfy and pay (if the said judgment be affirmed or the proceedings in error be discontinued by the plaintiff therein) such sum of money and costs as have been or may be adjudged due in respect of the judgment recovered, and all costs and damages to be awarded for the delaying of execution (*l*). The statutory provisions last referred to, together with the ample powers of amendment (*m*) which the Courts of law now possess, and the rules as to costs in error, protect, to a great extent, parties who have been successful at the trial from being on insufficient grounds deprived of the fair result thereof; at the same time, to facilitate the correction of defects which have really occurred in a cause, it is enacted that Courts of error may in all cases "give such judgment and award such process as the Court from which error is brought ought to have done without regard to the party alleging error" (*n*).

Audità querelâ.

Proceedings in error being thus applicable in those cases only where either party has committed such mistakes as above specified during the progress of the suit, there yet remains a possibility of injustice being done to a defendant against whom judgment has been given, by enforcing it when he has become possessed subsequently thereto of a good defence to the action. Under these circumstances

(*l*) C. L. Proc. Act, 1852, s. 151; *James* v. *Cochrane*, 9 Exch. 552; Pr. R. r. 110.

As to costs in error, see *Fisher* v. *Bridges*, 24 L. J., Q. B., 165; *Marshall* v. *Jackson*, 24 L. J., Q. B., 166 (*n*).

(*m*) *Wilkinson* v. *Swarland*, 11 Exch. 33. This authority shews, that the record may be amended up to the day of the sitting in error.

(*n*) C. L. Proc Act, 1852, s. 157.

As to restitution by writ of scire facias after a reversal in error, see C. L. Proc. Act, 1852, s. 132.

such defence, whether legal (*o*) or equitable (*p*), is allowed to be set up by way of auditâ querelâ (*q*). The writ of auditâ querelâ, however, has been seldom employed in modern times (*r*), the object in view being more conveniently (*s*) attained by motion; and indeed a defendant, in order to avail himself of a writ of auditâ querelâ, must now procure a rule of court or order of a judge (*t*) before it can be issued.

SECT. II.—*Of a Suit in the County Court.*

Practice of the county court—how constituted.

The practice of the county courts, as at present constituted, is regulated by various statutes below cited (*u*), and

(*o*) 3 Bla. Com. p. 406.

(*p*) C. L. Proc. Act, 1854, s. 84.

(*q*) "A writ of *auditâ querelâ* lies for a man in execution, or in danger of it, upon a judgment, statute merchant, or recognizance, where he has matter in fact or in writing to avoid such execution, and no other means to take advantage of it:" Com. Dig. Aud. Quer. See *Turner* v. *Davies* 2 Wms. Saund. 137, n. and notes thereto, and 2 Wm. Saund. 147, n. 1.

(*r*) *Dearie* v. *Ker*, 4 Exch. 82; *Humphrey* v. *Knight*, 6 Bing. 572; *Williams* v. *Roberts*, 1 L. M. & P. 381; *Sutton* v. *Bishop*, 4 Burr. 2283.

(*s*) *Plevin* v. *Henshall*, 10 Bing. 26.

(*t*) Pr. R. r. 79.

(*u*) 9 & 10 Vict. c. 95; 12 & 13 Vict. c. 101; 13 & 14 Vict. c. 61; 15 & 16 Vict. c. 54; 17 & 18 Vict. c. 16.

As to the jurisdiction of the county court generally, see pp. 59 et seq. There are many statutes in force which relate to their jurisdiction and practice on particular points. Thus, as to jurisdiction under 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96 (Protection Acts), see 10 & 11 Vict. c. 102. See further as to costs incurred by the removal of nuisances, 11 & 12 Vict. c. 123. As to the practice relating to winding-up joint-stock companies, 12 & 13 Vict. c. 108; relating to absconding debtors, 14 & 15 Vict. c. 52. As to the Crown suing for duties or penalties under the Customs Act, 16 & 17 Vict. c. 107. As to detaining vessels upon complaint of injuries done thereby till satisfaction or security is given, 17 & 18 Vict. c. 104. As to reference to arbitration of a county court judge, 17 & 18 Vict. c. 125. As to determining certain disputes in industrial and provident societies, 15 & 16 Vict. c. 31, s. 5;

by certain rules made in pursuance of the 12 & 13 Vict. c. 101, s. 12. It should be also premised, that "the general principles of practice in the superior Courts of common law may be adopted and applied at the discretion of the judges (of the county court) to actions and proceedings in their several courts" (*b*).

Plaint.

Summons.

The suit in a county court is commenced (*c*) by *plaint*, upon entry whereof a *summons* to appear is issued to the bailiff of the court (*d*), to be by him served on the defendant ten clear days at least before the holding of the Court at which it is returnable (*e*). To the summons must be annexed a copy of the plaintiff's particulars of demand, in those cases where they are required (*f*).

Particulars of demand.

There are no written pleadings in a suit (*g*) in the county court; but if any one or more of certain defences are intended to be set up, notice thereof, unless the plaintiff consent to waive it, must be given to him. These defences are In-

and in friendly societies, 18 & 19 Vict. c. 63, ss. 41—43, and the orders in pursuance thereof issued, of November, 1855. As to succession duties, 16 & 17 Vict. c. 51, s. 50. As to charitable trusts, 16 & 17 Vict. c. 137. As to determining certain disputes in literary and scientific institutions, 17 & 18 Vict. c. 112.

(*b*) *Chinn* v. *Bullen*, 8 C. B. 447.

(*c*) 9 & 10 Vict. c. 95, s. 59.

(*d*) Rule 36.

(*e*) 9 & 10 Vict. c. 95, s. 59. As to the mode of service generally, see Broom's Prac. County Courts, pp. 89 et seq.

(*f*) See rules 27 and 28; *Howard* v. *Remer*, 2 E. & B. 915; *Smith* v. *Douglas*, 16 C. B. 31.

(*g*) As to the respective modes of proceeding, if the defendant confess the whole or part of the claim against him, and suffer judgment, see 13 & 14 Vict. c. 61, s. 8, and 202nd rule. If he make a settlement before trial with plaintiff, see same statute, s. 9, and 203rd rule; or, if he pay money into court, see 9 & 10 Vict. c. 95, s. 82, and 62nd rule.

Any cause may be referred to arbitration, by order of the Judge upon the consent of both parties, *Roper* v. *Levy*, 7 Exch. 55, 57; and the award may be entered as the judgment in the case: 9 & 10 Vict. c. 95, s. 77; and see 13 & 14 Vict. c. 61, s. 17, 191st rule; 14 & 15 Vict. c. 99, s. 16.

fancy, Coverture, the Statute of Limitations, and discharge under any Statute relating to Bankrupts, or any Act for the Relief of Insolvent Debtors (*h*). All other defences are available to the defendant at the trial, whether by traverse or confession and avoidance, without any formal joinder of issue. When no jury has been impannelled, the judge himself determines matters as well of fact as of law; but a jury may be summoned on the requisition of either party to the suit, as matter of right whenever the amount claimed exceeds 5*l.*; and in any case where such amount does not exceed 5*l.*, the judge may, on the application of either party, order the action to be tried by a jury (*i*). Course of pleading.

Assuming that both parties to the suit appear, the judge, either with or without a jury, as the case may be, proceeds to hear the cause. If neither counsel nor attornies attend, the judge must endeavour to elicit from the parties and their witnesses (whose attendance is procured by summons (*k*)), such facts as will enable him to determine the question or questions in dispute. When the case is closed on both sides, the judge, if unassisted by a jury, decides both on fact and law; but, if assisted by a jury, he will direct them in point of law, whilst they decide upon the facts. Judgment is then given for the plaintiff or defendant—unless indeed the former be nonsuited—and entered on the minutes of the Court. The judge also directs the mode of payment, which may be either by instalments or otherwise, of any sum to which he may find the plaintiff entitled (*l*). The costs of the action abide the event, unless the judge shall otherwise order, and The hearing. Judgment.

(*h*) 9 & 10 Vict. c. 95, s. 76.

(*i*) Id. ss. 70, 71, 72; and see rules 79, 80, 83.

(*k*) 9 & 10 Vict. c. 95, ss. 85, 86, 87, rules 75, 76, 78.

(*l*) 9 & 10 Vict. c. 95, s. 92, rules 116, 117.

execution "may issue for the recovery of any such costs in like manner as for any debt adjudged in the said court" (*m*).

Execution against the goods.

The judgment, when entered up, may be enforced by execution against the goods, or in certain cases by the commitment of the defaulting party. Execution against the goods is leviable by writ of fieri facias; and it may be worth notice, that the wearing apparel and bedding of the judgment debtor or his family, and the tools and implements of his trade, to the value of 5*l.*, are protected from seizure (*n*).

Execution against the person.

Execution against the person may be obtained on a summons; and the 98th section of 9 & 10 Vict. c. 95, enacts, that, after default is made upon the order of the judge for payment of the money recovered, any party who has obtained such unsatisfied judgment or order in the county court for the payment of any debt, damages, or costs, may procure a summons from the court, within the limits of which the defaulting party shall then dwell or carry on his business (*o*), requiring him to appear to answer the matters mentioned in the summons. If the party so summoned shall not attend, or shall refuse to be sworn or disclose the information

(*m*) 9 & 10 Vict. c. 95, s. 88.

When an order has been made for the debt to be paid by instalments, execution will not issue till after default in payment of an instalment; and it may then issue for the whole sum due: Id. s. 95.

(*n*) Id. ss. 94, 96; 8 & 9 Vict. c. 127, s. 8.

As to what may be seized, and with respect to execution generally, and when it may be stayed, suspended, or superseded, or had out of the jurisdiction of the court, see Broom's Prac. County Courts, Chap. 3, Sect. 5, where the sections of the statutes relating thereto, and the practice rules thereon, will be found. An action in a superior Court does not lie on a judgment of a county court: *Berkeley* v. *Elderkin*, 1 E. & B. 805; *Austin* v. *Mills*, 9 Exch. 288. See *Morton* v. *Holt*, 10 Exch. 707.

(*o*) *Houlden* v. *Smith*, 14 Q. B. 841; *Stokes* v. *Grissell*, 14 C. B. 678; *Mitchell* v. *Hender*, 23 L. J., Q. B., 273.

required of him touching his estate and effects, or shall give unsatisfactory answers as to the incurring and nonpayment of the debt, or shall appear to have acted fraudulently or improperly in contracting the debt, or in disposing of his property, with intent to defraud his creditors, he is then liable to be committed to prison for any period not exceeding forty days, if the judge shall think fit so to order (*p*). And further, by the 101st section of the same statute, it is provided, that at the hearing the judge may make a like order for the like reasons (*q*). It should be observed, however, that although the defendant undergo the imprisonment awarded by the order for commitment, the debt is not thereby satisfied or extinguished (*r*), and he may, at the discretion of the judge, in certain cases of subsequent default, be committed for any number of successive periods not exceeding forty days each, until payment of the debt or instalment in question is enforced. It seems, moreover, that "the debtor is not protected from this proceeding by a discharge under an Insolvent Act; and no protection, order, or certificate, granted by any Court of Bankruptcy or for the Relief of Insolvent Debtors, is available to discharge a party from such commitment" (*s*).

New trial.

It is competent to either party, dissatisfied with the verdict or decision of the case, to apply for a new trial, which

(*p*) 9 & 10 Vict. c. 95, s. 99; rule 130; also *Ex parte Purdy*, 9 C. B. 201; *Abley* v. *Dale*, 10 C. B. 62; *S.C.* 11 C. B. 378; *Ex parte Dakins*, 16 C. B. 77.

(*q*) *Ex parte Purdy*, ubi sup.

(*r*) *In re Boyce*, 2 E. & B. 521; *Berkeley* v. *Elderkin*, 1 E. & B. 805; *Hayes* v. *Keene*, 12 C. B. 233.

(*s*) County Court Com., 1st Rep., p. 14; *Ex parte Christie*, 24 L. J., Q. B., 144; *George* v. *Somers*, 16 C. B. 539; 24 L. J., Exch., 247.

See the subject above alluded to fully discussed in the Law Mag. for November, 1855.

the judge may in his discretion refuse, or order upon such terms as he shall think reasonable (*t*).

Proceedings by certiorari.

The mode of removing a cause from the jurisdiction of the county court to that of a superior Court, is by writ of certiorari. This course, however, cannot be adopted unless the debt or damage claimed shall exceed 5*l.*, and then only by leave of a judge of one of the superior Courts, in cases which shall appear to him proper to be tried there, and on such terms as he shall deem fit to impose (*u*). One of the usual grounds for granting the writ in question is, that difficult questions of law will arise in the suit (*v*). Also, if either party to a suit in the county court, when the claim is for a sum between 20*l.* and 50*l.*, or when jurisdiction is given by agreement, unless the right of appeal is specially excluded also by agreement (*x*), is dissatisfied with the determination or direction of the said court (*y*) in point of law, or upon the admission or rejection of any evidence, such party may appeal from the same to any of the superior Courts of common law at Westminster (*z*). Be-

Appeal to superior Court.

(*t*) Rules 141, 142, 144; *Jones* v. *Jones*, 5 D. & L. 628; *Robinson* v. *Lenaghan*, 2 Exch. 337; *Sparrow* v. *Reed*, 5 D. & L. 633; *Ely* v. *Moule*, 5 Exch. 918; *Mossop* v. *The Great Northern R. C.*, 16 C. B. 580; *Re Carter*, 24 L. J., Q. B., 141.

(*u*) 9 & 10 Vict. c. 95, s. 90; 13 & 14 Vict. c. 61, s. 16; *Box* v. *Green*, 9 Exch. 503; *Symonds* v. *Dimsdale*, 6 D. & L. 17; *Mungean* v. *Wheatley*, 6 Exch. 88, 95–8; *Moreton* v. *Holt*, 10 Exch. 707.

(*v*) See *Hunt* v. *Great Northern R. C.*, 10 C. B. 900; *Rees* v. *Williams*, 7 Exch. 51; *Parker* v. *Bristol and Exeter R. C.*, 6 Exch. 184; *Longbottom* v. *Longbottom*, 8 Exch. 203, 208.

(*x*) 17 & 18 Vict. c. 16, s. 1. As to jurisdiction by consent, see ante, p. 67.

(*y*) *Cawley* v. *Furnell*, 12 C. B. 291; *East Anglian R. C.* v. *Lythgoe*, 10 C. B. 726; *S. C.*, 2 L. M. & P. 221; *Templeman* v. *Haydon*, 12 C. B. 507; *Great Northern R. C.* v. *Shepherd*, 8 Exch. 30; *Cuthbertson* v. *Parsons*, 12 C. B. 304; *Clarke* v. *Stancliffe*, 7 Exch. 439.

(*z*) 13 & 14 Vict. c. 61, s. 14, as altered by 15 & 16 Vict. c. 54, s. 2; *Harris* v. *Dreesman*, 9 Exch. 485; *Mayer* v. *Burgess*, 24 L. J., Q. B., 67.

fore, however, the appeal is allowed to be prosecuted, sufficient security must be given by the appellant (*a*).

In the foregoing pages has been exhibited a brief sketch of the ordinary course of procedure connected with a suit in the county court,—a subject which must be pursued in detail by reference to Books of Practice. Here, then, the present chapter is brought conveniently to a close, and I shall next proceed to inquire as to some Extraordinary Remedies permitted to an aggrieved party, or afforded under peculiar circumstances by our Courts of law.

(*a*) 13 & 14 Vict. c. 61, s. 14; rule 144; *Daniels* v. *Charsley*, 11 C. B. 739.

As to costs on appeal, see *Leidemann* v. *Schultz*, 14 C. B. 38; *Gibbon* v. *Gibbon*, 13 C. B. 219; *Robinson* v. *Lawrence*, 7 Exch. 123.

As to the appeal from a judgment in respect of the recovery of small tenements, see 9 & 10 Vict. c. 95, ss. 122—127.

As to the action of replevin which originates in the sheriff's court, (ante, pp. 128, 129,) see Broom's Pract. County Courts, pp 233-4.

CHAPTER V.

OF EXTRAORDINARY REMEDIES.

BESIDES suit in a Superior Court of common law, or in the County Court, there are other remedies of an "extra-judicial or eccentrical" (*a*) character, which are permitted in certain cases, and will here be treated of under the title of "Extraordinary Remedies." These are applicable for the redress of divers injuries which are "of such a nature that some of them furnish, and others require a more speedy remedy than can be had in the ordinary forms of justice" (*a*).

Extraordinary remedies—how classified.

A wrong may, in certain cases, be redressed, or its continuance be prevented: 1. By the act of the party injured (*b*); 2. By the mere operation of law, independently of the ordinary mode of procedure. 3. By the exercise of the extraordinary powers of the Court (*c*).

Self-defence.

1. Under the first of the above three classes falls the remedy by *self-defence*, which is founded on the right derived to us from the law of nature to repel force by force. But

(*a*) 3 Bla. Com., p. 3.

(*b*) As to which see Evans's Decis. of Ld. Mansfield, vol. 2, pp. 122—128.

(*c*) In strictness, under the head of Extraordinary Remedies should be included *accord* and *arbitration*. Of which the former is defined to be "a satisfaction agreed upon between the party injuring and the party injured, which, when performed, is a bar of all actions upon this account:" 3 Bla. Com., p. 15. Arbitration is generally the "judgment or decree of persons elected by the parties to arbitrate of the things submitted to them:" Com. Dig. Arbitrament, (A.). But reference to arbitration may now be ordered, and an arbitrator appointed, under certain provisions of the C. L. Proc. Act, 1854; as to which, see ante, p. 177.

although the law permits this to be done in certain cases, it behoves one who thus undertakes his own protection, or that of his dependents, not to overstep the bounds of moderation, or to use force exceeding in degree what may be necessary for effecting the end in view; for, by doing so, he may perchance constitute himself an aggressor (*d*). Nor is the license thus conceded restricted to a defence of the person merely; for the rightful owner, in peaceable possession of property, may defend such possession by force, and will be therein justified unless his possession was unlawful (*e*).

Recaption is a remedy in certain cases given to a man when he has been wrongfully deprived of his goods by another. "If a man takes my goods and carries them into his own land, I may justify my entry into the said land to take my goods again; for they came there by his own act" (*f*). But the mere fact of my goods being placed on another man's land, will not justify my entering thereon, and repossessing myself of the goods, unless they have been feloniously stolen (*g*). If, however, they are found in a common, fair, or a public inn, it is laid down that they may be lawfully re-seized by the rightful owner (*h*). Recaption.

Besides the justification thus in certain cases afforded to one who enters upon the premises of another to repossess himself of goods tortiously placed there, parties may similarly right themselves, without resorting to law, under some other circumstances: for example, in the case of fruit dropping from

(*d*) See 3 Bla. Com., p. 4; 1 Selw. N. P., 10th edit., pp. 30 et seq.; post, p. 932.

(*e*) Judgm. *R.* v. *Wilson*, 3 Ad. & E. 825.

(*f*) Vin. Abr. Trespass, 1 (*a*).

(*g*) Per *Parke*, B., *Patrick* v. *Colerick*, 3 M. & W. 486; *Anthony* v. *Haneys*, 8 Bing. 186.

(*h*) 3 Bla. Com, p. 4. See *Earl of Bristol* v. *Wilsmore*, 1 B. & C. 514.

one man's tree on to the land of another, or of trees themselves falling thereon. In such case, the owner of the fruit or of the trees may justify entering his neighbour's land to recover his property, on the ground of accident (*i*). This natural right of recaption, as it has been called (*k*), is thus limited as a remedy, that the public peace be not endangered by reason of its forcible assertion.

Eviction.

An entry by the lawful owner upon lands and tenements of which another is in possession without right, is also in some cases permitted. There is no doubt that where one has taken or holds possession wrongfully of lands, the lawful owner may make a *peaceable* entry thereon (*l*), and, after notice, may eject with no unnecessary violence the tenant in possession. In *Newton* v. *Harland* (*m*), an important point was raised in connection with the subject now before us, which, after three trials of the cause, and various arguments in banc, cannot yet be considered as finally and satisfactorily settled. The broad question there discussed was, whether a landlord is liable in trespass who *forcibly* enters upon the demised premises, and ejects a tenant holding over after the expiration of his term. It is clear that a tenant holding over cannot treat the landlord who enters peaceably as a trespasser; and if a landlord so enters, he may, after notice, eject with no unnecessary violence the tenant

(*i*) Per *Tindal*, C. J., *Anthony* v. *Haneys*, 8 Bing. 192, commenting on *Millen* v. *Hawery*, Latch. 13; and Vin Abr. Trespass, H., a, 2., and L., a; 6 Edw. 4, 18; *Webb* v. *Beavan*, 3 Scott's N. R. 937, n. 15. As to recovery of loppings which necessarily fall on to the lands of another, see Yr. Bk. 6 Edw. 4, fo. 18, 19, and *Millen* v. *Hawery*, ubi sup.

(*k*) 3 Bla. Com., p. 4.

(*l*) Per Lord *Kenyon*, C. J., *Taylor* v. *Cole*, 3 T. R. 295, cited per Lord *Denman*, C. J., *Harvey* v. *Brydges*, 1 Exch. 263. See the judgment, *R.* v. *Wilson*, 3 Ad. & E. 824.

(*m*) 1 M. & Gr. 644.

in possession, because the one is lawfully in possession, and the other, by continuing on the land after notice, is a trespasser. And notwithstanding some difference of opinion (*n*) upon the subject, it seems that, in an action of trespass, "it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly, even though in so doing a breach of the peace was committed" (*o*).

Abatement of private nuisance.

Again; subject to the condition that no riot be committed by the act, a nuisance (*p*) may be abated, i.e. removed by the party injured thereby, whether it be a *private* nuisance —such as the obstruction of an individual's ancient lights— or a *public* nuisance, as where a gate is placed unlawfully across the king's highway (*q*). It has been held, indeed, that notice must, under certain circumstances, be given, prior to abating a private nuisance, to the party on whose land it exists. Various authorities bearing upon this point are cited and reviewed in *Jones* v. *Williams* (*r*), where *Parke*, B., says,—"It is clear that if the plaintiff himself was the original wrongdoer, by placing the filth (which was the nuisance in question) upon the locus in quo, it might be removed by the party injured without any notice to the plaintiff; and so, possibly, if by his default in not performing

(*n*) See *Newton* v. *Harland*, supra; Per *Cresswell*, J., *Davis* v. *Burrell*, 10 C. B. 825; Per *Parke*, B., and *Alderson*, B., *Harvey* v. *Brydges*, 14 M. & W. 437; *S. C.* 1 Exch. 261.

(*o*) Per. *Parke*, B., *Harvey* v. *Brydges*, 14 M. & W. 442.

(*p*) Post, p. 789.

(*q*) Judgm. *Mayor of Colchester* v. *Brooke*, 7 Q. B. 377, citing 3 Bla. Com., p. 5. See *Renshaw* v. *Bean*, 18 Q. B. 112.

(*r*) 11 M. & W. 176; and see *Baten's case*, 9 Rep. 53 b, 54 b; *Penruddock's case*, 5 Rep. 100; *Earl of Lonsdale* v. *Nelson*, 2 B. & C. 302, *Morrice* v. *Baker*, 3 Bulst. 198; *Arlett* v. *Ellis*, 7 B. & C. 346.

some obligation incumbent on him—for that is his own wrong also; but if the nuisance was levied by another, and the defendant succeeded to the possession of the locus in quo afterwards, the authorities are in favour of the necessity of a notice being given to him to remove, before the party aggrieved can take the law into his own hands." Further, the Court intimated an opinion that "it might be necessary —in some cases where there was such immediate danger to life or health as to render it unsafe to wait—to remove without notice." In *Perry* v. *Fitzhowe* (s), some material points in reference to the subject now under consideration were determined. The action there was in trespass; and the main question presented for discussion was, whether the defendant could lawfully pull down the plaintiff's dwelling-house, he and his family being in it at the time, the dwelling-house in question having been wrongfully erected upon a place over which the defendant had a right of common, which was thus infringed? In determining this question, the Court observed, there is no doubt, as a general rule, that a person who is injured by a *private* nuisance may abate it; and within this rule the case of a commoner is included, so that he may abate a nuisance which interferes with his right, so far as may be necessary for its exercise. Nor does the nature of the building which obstructs the exercise of the right seem material. A house may be pulled down just as much as a barn or any other building. Does, then, the fact that individuals are in the house at the time in question, render the act of pulling it down unlawful? Reasoning by analogy from the law of distress, it seems to do so. A horse on which a man is riding, or tools which he is

(s) 8 Q. B. 757; *Dimes* v. *Petley*, 15 Q. B. 276, 283; *Davison* v. *Wilson*, 11 Q. B. 890.

using, cannot be distrained, on account of the imminent risk which there would be of a breach of the peace taking place if such a distress were permitted (*t*); and surely the risk of a breach of the peace is much more imminent in the case of pulling down a house in which persons actually are. An act done under such circumstances would be specially calculated to excite violence; and the law will not permit any man to pursue his remedy at such risk.

The decision just adverted to, which is one of some importance, has been commented upon, but never overruled. No very general principle, however, can safely be deduced from it. It certainly would not be true to say that the rightful owner of land could not justify the forcible expulsion from it of a mere trespasser who had taken possession, or the pulling down of a house wrongfully built upon it by such a trespasser. It cannot be, that a mere stranger acquires a title by intrusion, except where his possession has continued during the period prescribed by the Statutes of Limitation. In such a case the owner of the soil may enter, and, with a view to ejecting the tenant, pull down any house which he may have erected there, although he be inhabiting it at the time (*u*).

In the case of *Perry* v. *Fitzhowe*, it will be found that the plea of justification did not contain any averment of *notice* to the plaintiff previous to the alleged trespass. If there be such notice, that decision will not avail as a precedent; for there is a wide distinction between the case of parties suddenly coming to a dwelling-house in actual occupation, and without notice or demand forcibly pulling it down, and the case in which the occupier has had previous

(*t*) *Field* v. *Adames*, 12 Ad. & E. 649.

(*u*) *Burling* v. *Read*, 11 Q. B. 904; *Davison* v. *Wilson*, Id. 890.

notice, and has been requested to remove the building, but has persisted in remaining in the house with his family in defiance of the notice. In *Davies* v. *Williams* (*x*), it was expressly held, that where a house has been wrongfully built upon a common, and obstructs the enjoyment of the right of common, a commoner may, after notice and request to the plaintiff to remove the house, pull it down, although the plaintiff is actually inhabiting it and present therein.

Abatement of public nuisance.

In regard to the abating of a *public* nuisance, it is laid down (*y*), that "if a new gate be erected across the public highway, which is a common nuisance, any of the King's subjects passing that way may cut it down and destroy it." The cases below referred to (*z*), however, shew that to justify a private individual in abating on his own authority such a nuisance, it must appear that it does him a special injury; and he can only interfere with it as far as may be necessary to exercise his right of passing along the highway with reasonable convenience, and not because the obstruction happens to be there.

Distress

Another "case in which," says Blackstone, "the law allows a man to be his own avenger, or to minister redress to himself, is that of distraining cattle or goods for non-payment of rent or other duties; or distraining another's cattle damage feasant, that is, doing damage or trespassing upon his land" (*a*). The right of distress is also given to enforce the recovery of other "duties besides those in the nature of debt;—for example, assessments and rates under special Acts of Parliament" (*b*). Into the mode of enforcing a re-

(*x*) 16 Q. B. 546.

(*y*) 3 Bla. Com., p. 5.

(*z*) *Dimes* v. *Petley*, 15 Q. B. 276; *Bridge* v. *The Grand Junction R. C.*, 3 M. & W. 244; *Davies* v. *Mann*, 10 M. & W. 546; *The Mayor of Colchester* v. *Brooke*, 7 Q. B. 339; *Bateman* v. *Bluck*, 21 L. J., Q B., 406.

(*a*) 3 Bla. Com., p. 6.

(*b*) Per Lord *Mansfield*, C. J.,

medy by distress in any of these cases, it is not the object of this work minutely to enter (*b*).

Remedies by operation of law.

2. Remedies by the mere operation of law—independent of the ordinary mode of procedure—are afforded when parties are so peculiarly circumstanced that for some reason they cannot appeal through the usual channels of justice for redress; and "the benignity of the law is such as, when to preserve the principles and grounds of law it deprivetb a man of his remedy without his own fault, it will rather put him in a better degree and condition than in a worse" (*c*). These remedies are: 1. By *retainer*—when a creditor is made executor or administrator to his debtor; under which circumstances the personal representative may retain out of the assets of the deceased the debt due to himself, in preference to paying other creditors whose debts are of equal degree with his own (*d*). 2. By *remitter*—"where he who hath the true property or *jus proprietatis* in lands, but is out of possession thereof, and hath no right to enter without recovering possession in an action, hath afterwards the freehold cast upon him by some subsequent, and of course defective, title. In this case he is remitted, or sent back by operation of law to his ancient and more certain title" (*e*).

Retainer.

Remitter.

Hall v. *Harding*, 4 Burr. 2426. To this right is allied that of seizing a heriot on behalf of the lord and a waif, wreck or estray by the person entitled to it: 3 Bla. Com., p. 15.

(*b*) This subject is fully treated in Woodf. L. & T., 6th edit., Bk. 2, Chap. 2.

The distinction between the "old common law distresses, which were in nature of a nomine pœnæ, to compel payment;" and such distresses, "when the things distrained may immediately be sold by way of satisfaction" or execution, is pointed out by Lord *Mansfield* in *Hutchins* v. *Chambers*, 1 Burr. 579.

(*c*) Bac. Max., reg. 9.

(*d*) 1 Wms. Saund. 333, n. 6; *De Tastet* v. *Shaw*, 1 B. & Ald. 664.

(*e*) 3 Bla. Com., p. 19. See *Doe* d. *Daniel* v. *Woodroffe*, 2 H. L. Ca. 811; *S. C.* 15 M. & W. 769; 10 M. & W. 608.

Remedial process afforded by the Courts.

Motion.

3. As a general rule, our Courts will not interfere on motion to adjudicate between litigating parties upon rights which may by action at law be duly investigated. A motion indeed is very often ancillary or in some manner incidental to a pending suit—it may arise out of—but cannot ordinarily be used as a substitute for—the remedy by action. To this rule there are however some exceptions. Thus, an attorney, being an officer of the Court and in that character amenable to its surveillance, may sometimes be compelled by motion in a summary way to do that, for the not doing of which an action would have lain, and he may also sometimes on motion be punished for negligence (*f*).

The jurisdiction exercised by the Courts in such cases depends upon the character assumed by the party against whom a complaint is put forth, so that it has been repeatedly held that the Court will not interfere summarily to compel payment of money or the restitution of deeds detained by an attorney, unless the deeds or monies were received by him in the character of attorney, or whilst acting as such for the applicant; "where," says Lord *Tenterden*, C. J. (*g*), "an attorney is employed in a matter wholly unconnected with his professional character, the Court will not interfere in a summary way to compel him to execute faithfully the trust reposed in him. But where the employment is so connected with his professional character as to afford a presumption that his character formed the ground of his employment by the client, there the Court will exercise this

(*f*) *Meggs* v. *Binns*, 2 Bing. N. C. 625; *Hawkins* v. *Harwood*, 4 Exch. 503; *Cooper* v. *Stephenson*, 21 L. J., Q. B., 292; *Tharratt* v. *Trevor*, 7 Exch. 161; and cases cited Broom's Pract. vol. 1, pp. 114 et seq.

(*g*) *Re Aitkin*, 4 B. & Ald. 49; *Ex parte Bodenham*, 8 Ad. & E

jurisdiction." In *Re Hilliard* (*h*), *Coleridge*, J., observes, respecting the grounds on which is founded the extraordinary remedy by motion against an attorney, as follows:—"It seems to me," says the learned Judge just named, "that the Court does not interfere merely with a view of enforcing contracts, on which actions might be brought, in a more speedy and less expensive mode; but with a view to securing honesty in the conduct of its officers, in all such matters as they undertake to perform or see performed, when employed as such, or because they are such officers." . . . The Court "does not interfere so much, as between party and party, to settle disputed rights, as criminally to punish, by attachment, misconduct or disobedience in its officers" (*i*).

The entire jurisdiction of a Court of law on motion is, indeed, not merely in the particular class of cases above alluded to, but in others also, essentially regulated by its discretion, in the exercise whereof an extraordinary remedy will sometimes be extended to an applicant, in pursuance of the great principle, that 'where there is a right there is a remedy;'—sometimes it will be refused, viz. where private convenience is made to bend to general considerations of expediency or motives of policy.

The extraordinary jurisdiction exercised by our legal

959; *Re Lord Cardross*, 5 M. & W. 545.

The Courts will, in some cases, on equitable principles, interfere between an attorney and his articled clerk, to order that the premium paid by the latter be refunded wholly or in part: *Ex parte Bayley*, 9 B. & C. 691; *Ex parte Fisher*, 1 Chit. R. 694; *Ex parte Prankerd*, 3 B. & Ald. 257; *In re Thompson*, 1 Exch. 864.

(*h*) 2 D. & L. 919.

(*i*) See *Thompson* v. *Gordon*, 15 M. & W. 610; *Ex parte Clifton*, 5 D. P. C. 218; *Duncan* v. *Richmond*, 7 Taunt. 391; *Collins* v. *Johnson*, 16 C. B. 589; *Guilford* v. *Sims*, 13 C. B. 371. See R. G., Hil. T., 1853, r. 3; *Ex parte Barber*, Mich. T., 1855.

tribunals in cases other than those above alluded to, is for the most part: 1, by writ of mandamus; 2, by writ of injunction; 3, by writ of prohibition; 4, by proceedings in the nature of a writ of quo warranto; 5, by writ of certiorari; 6, on interpleader; 7, by summary proceedings for the recovery of possession of small tenements; 8, by proceedings for the specific delivery of chattels; 9, by criminal information; 10, by writ of habeas corpus.

Mandamus.

1. The writ of *mandamus* is termed a high prerogative writ (*j*) issuing in the Queen's name out of the Court of Queen's Bench on special application made to it by motion. The writ commands those to whom it is directed to perform some specified duty (*k*). It is granted on the oath of the party injured, in all cases where he "hath a right to have anything done, and hath no other specific means of compelling its performance;" and also in *some* cases where the method of redress provided by the law is tedious or incomplete (*l*); the Court, however, will refuse to exert its extraordinary powers of redress by mandamus, where the ordinary remedy by action at law is adequate to enforce the legal right in question (*m*). And although a mandamus will be granted "when that has not been done which a

(*j*) As to the meaning of the term "prerogative" as applied to the writ of Mandamus, see Tapping on Mandamus, p. 4; Per Lord *Mansfield*, C. J., *R.* v. *Cowle*, 2 Burr. 855; *R.* v. *Heathcote*, 10 Mod. 54.

(*k*) 3 Bla. Com., p. 110.

(*l*) Id.; per Sir *W. Follett*, arguendo, *Veley* v. *Burder*, 12 Ad. & E. 266, citing *R.* v. *Bishop of Chester*, 1 T. R. 404; and *R.* v. *Marquis of Stafford*, 3 T. R. 652. See *Dr. Askew's case*, Burr. 2188--9; *R.* v. *St. Katherine's Dock Co.*, 4 B. & Ad. 360; *R.* v. *The Severn and Wye R. C.*, 2 B. & Ald. 646, commented on per Lord *Denman*, C. J., *Reg.* v. *Gamble*, 11 Ad. & E. 72.

(*m*) *Reg.* v. *The Hull and Selby R. C.*, 6 Q. B. 70; *Reg.* v. *Hopkins*, 1 Q. B. 161; *Reg.* v. *The Chapter of St. Peter's Exeter*, 12 Ad. & E. 512; *Reg.*

statute orders to be done," it will not be allowed to go "for the purpose of undoing what has been done" (*n*).

The proceeding by mandamus appears indeed to have been "*originally* confined in its operation to a very limited class of cases affecting the administration of public affairs; such as the election of corporate officers, the restoration of officers improperly removed, the compelling inferior courts to proceed in matters within their jurisdiction, or public officers to perform duties imposed upon them by common law or by statute, as to make a rate and the like" (*o*). In more recent times, however, the applicability of the remedy in question has been extended, not merely to the cases first above mentioned, but to some others. In the course of modern legislation, no session of Parliament occurs in which a great number of Acts of Parliament do not pass for making railways, forming docks, building bridges, improving towns, and for carrying out an infinite variety of public works, for the most part to be done by joint stock corporations or companies for the benefit of shareholders. Now in almost every Act of this kind numerous provisions are to be found, which direct that the company shall do certain works for the benefit of individuals, ex. gr. "making communications between lands intersected by works authorised by the Acts, substituting new buildings for others which have been necessarily removed, making roads and communications in lieu of old ones blocked up or injured," and a number of other works of a similar character (*p*). In the

v. *The Mayor &c. of Oxford*, 6 Ad. & E. 349; *Reg.* v. *Bristol and Exeter R. C.*, 3 Railw. Cas. 777. See *Moffatt* v. *Dickson*, 16 C. B. 543.

(*n*) Per Lord *Campbell*, C. J., *Ex parte Nash*, 15 Q. B. 95.

(*o*) C. L. Com., 2nd Rep., p. 40.

(*p*) Id., where the reader will find the former practice relating to mandamus described.

event of non-compliance with these enactments, the individual who suffers detriment therefrom may resort to the remedy of mandamus (*q*).

Further, the Court of Queen's Bench will in general exercise control over inferior courts by mandamus, when the latter, having jurisdiction, refuse to act thereunder; but the writ is never granted on the ground that in any particular case the court below has come to an unjust or improper conclusion (*r*). It is also sometimes issued in aid of legal proceedings, as by ordering that a creditor of a company should be at liberty to inspect the register of the shareholders with a view to his issuing execution against them (*s*)—or by commanding a clerk of a county court to issue execution after judgment recovered (*t*).

Return to the writ.

It may be observed, that the writ, in the first instance, commands the party to whom it is addressed to do the act required, *or* to make a return thereto, by shewing cause why he does not do it; and unless he does the act or succeeds

(*q*) With respect to a mandamus to enforce upon a railway company the carrying out of its statutory powers, see *Reg.* v. *The York and North Midland R. C.*, 1 E. & B. 858; *Reg.* v. *The Lancashire and Yorkshire R. C.*, 1 E. & B. 228; *Reg.* v. *The Great Western R. C.*, 1 E. & B. 253.

(*r*) *Reg.* v. *The Justices of Worcestershire*, 3 E. & B. 477; *Sturgis* v. *Joy*, 2 E. & B. 740; *Reg.* v. *Welch*, 2 E. & B. 357; *Reg.* v. *Archbishop of Canterbury*, 11 Q. B. 483; *Reg.* v. *Fletcher*, 2 E. & B. 279. And see *Ex parte Mawby*, 3 E. & B. 718.

The 11 & 12 Vict. c. 44, s. 5, provides proceedings by rule, which may be employed instead of those by mandamus, for the purpose of determining any question as to the legality or illegality of any official act, which a justice of the peace may have refused to perform: *Reg.* v. *Deverell*, 3 E. & B. 374; *Reg.* v. *Justices of Bristol*, 3 E. & B. 479, note.

(*s*) *Reg.* v. *The Derbyshire &c. Co.*, 3 E. & B. 784; *Reg.* v. *Harrison*, 9 Q. B. 794.

(*t*) *Reg.* v. *Fletcher*, 2 E. & B. 279.

Where it is doubtful whether the act to be done in pursuance of a mandamus issued to a county court judge would not subject him to an action, the rule will not be granted: *Reg.* v. *Dowling*, 2 E. & B. 204.

in quashing the writ as being insufficient on the face of it, he must proceed in answer to the writ either by plea or demurrer,—but if judgment is given against him, the Court then awards a *peremptory mandamus*, and, in cases of private injury, damages and costs (*u*).

When a rule is applied for, asking that a writ in the alternative shall thus issue, such a rule may be nisi only, or may be absolute in the first instance, and, if the Court shall think fit, it "may bear teste on the day of its issuing, and may be made returnable forthwith, whether in term or in vacation" (*x*).

A peremptory writ of mandamus may also issue after judgment recovered in an action of mandamus, as founded upon the Second Common Law Procedure Act—the nature of which action has been already referred to (*y*). It is therefore only necessary here to notice, that, when in such an action "judgment shall be given for the plaintiff that a mandamus do issue, it shall be lawful for the Court in which such judgment is given, if it shall see fit, besides issuing execution in the ordinary way for costs and damages," (in those cases where they are claimed in addition to the writ of mandamus) "also to issue a peremptory writ of mandamus to the defendant commanding him forthwith to perform the duty to be enforced" (*z*); and a writ so issued will have

(*u*) As to costs of these proceedings, see *Reg.* v. *Justices of Surrey*, 9 Q. B. 37; *Reg.* v. *Harden*, 1 B. C. C. 214: *Reg.* v. *South Eastern R. C.*, 3 H. L. Cas. 471.

(*x*) C. L. Proc. Act, 1854, s. 76. By s. 77, the provisions of the C. L. Proc. Acts, "so far as they are applicable, shall apply to the pleadings and proceedings upon a prerogative writ of mandamus." The other statutes, by which proceedings by mandamus are regulated, are 4 Anne, c. 16; 9 Anne, c. 20; 1 Will. 4, c. 21; 6 & 7 Vict. c. 67. By the last-mentioned stat., s. 2, a judgment in mandamus may be taken into a Court of error.

(*y*) Ante, p. 129.

(*z*) C. L. Proc. Act, 1854, s. 71.

the same force as "a peremptory writ of mandamus issued out of the Court of Queen's Bench, and in case of disobedience may be enforced by attachment" (*a*).

Injunction.

2. The writ of *injunction* given to the superior Courts of Common Law by the Second Common Law Procedure Act (*b*), was devised with a view to prevent the necessity of calling into requisition the powers of a Court of equity, in some cases when an action has already been commenced. The proceedings in connection with it are required to be the same as nearly as may be, and subject to the like control as in an action to obtain a mandamus just alluded to (*c*).

Prohibition.

3. The writ of *prohibition* issues out of the superior Courts at Westminster (*d*), and is directed to the judge of an inferior court, or the parties to a suit therein, or both conjointly, requiring that the proceedings which have been commenced there be either conditionally stayed or peremptorily stopped (*e*). The object of the writ is the keeping of the court to which it is directed within its proper jurisdiction (*f*), or to repress the assumption of authority by any *pretended* court (*g*).

Prohibition to ecclesiastical courts.

The writ of *prohibition*, it is now settled, may issue to a court ecclesiastical (*h*), where something is being done by

(*a*) Id., s. 73.

(*b*) Id., ss. 79—82; ante, p. 129.

(*c*) Id., s. 81. See analogous provisions in the Patent Law Amendment Act, 1852, and 13 & 14 Vict. c. 61, s. 22.

(*d*) Com. Dig. Prohibition (B.); *Anon.*, 1 P. Wms. 476; *Blackborough* v. *Davis*, Id. 43. See 13 & 14 Vict. c. 61, s. 22.

As to whether the granting of a prohibition is ex debito justitiæ or discretionary, see Bac. Abr. Prohibition (B.); and as to what Courts may grant the writ, Id. (A.), and Com. Dig. Prohibition (B.).

(*e*) *Anon.*, 6 Mod. 308; Bac. Abr. Prohibition (F.).

(*f*) Com. Dig. Prohibition (C.); Salk. 552.

(*g*) *Chambers* v. *Jennings*, Salk. 553.

(*h*) In earlier times, one of the main uses of the writ of prohibition was to restrain the jurisdiction of the ecclesiastical courts; and the

it "contrary to the general law of the land, or manifestly out of the jurisdiction of the court" (*i*).

Thus, if an ecclesiastical court "meddle with a matter purely temporal" (*j*), civil, or criminal (*k*), or with a wrong for which at common law there is a remedy (*l*), it oversteps its jurisdiction—and so where, either in the construction of a statute the spiritual court errs, or where a suit therein is "determined contrary to the right by the common law" (*m*),

reader is referred to Coke, 2nd Inst. tit. "Articuli Cleri" for the history of the disputes between the common law and ecclesiastical courts, in respect of the prohibitions issued to the latter by the former; he will there also learn how it happens that the grounds for a prohibition against a spiritual court (the practice of which is founded on the civil law) are in some respects different from those upon which the writ is granted against other inferior courts. See per *Coltman*, J., *Toft* v. *Rayner*, 5 C. B. 162. Many authorities as to granting this writ are collected in the notes to *Ex parte Tucker*, 1 M. & G. 519. See also *Hallack* v. *Cambridge Univ.*, 1 Q. B. 593; *Re Dean of York*, 2 Q. B. 1; *Burder* v. *Veley*, 12 Ad. & E. 233; *Ex parte Denison*, 4 E. & B. 292; 3 Bla. Com. 112; *Re Gorham* v. *Bishop of Exeter*, 5 Exch. 630; *S. C.*, 10 C. B. 102; 15 Q. B. 52.

(*i*) Per *Littledale*, J., *Ex parte Smyth*, 3 Ad. & E. 724; Per *Talfourd*, J., *Ex parte Story*, 12 C. B. 777; Vin. Abr. Prohibition (Q.).

Where the judge of any inferior court, spiritual or temporal, is interested in a cause, a prohibition will issue to restrain him from hearing it. See *Ex parte Medwin*, 1 E. & B. 609. See also *Reg.* v. *Justices of Hertfordshire*, 6 Q. B. 753; *Dimes* v. *Grand Junction C. Co.*, 3 H. L. Cas. 759.

(*j*) As opposed to "mere spiritualia:—Sic dicta quia non habent mixturam temporalium:" 2 Inst. 488.

(*k*) Bac. Abr. Prohibition (L.).

(*l*) *Galizard* v. *Rigault*, Salk. 552; *Free* v. *Burgoyne*, 5 B. & C. 400; *Townsend* v. *Thorpe*, 2 Ld. Raym. 1507.

As to some curious distinctions between what was "ecclesiastical slander," and what was beyond its cognisance, see *Smith* v. *Wood*, *Coxeter* v. *Parsons*, Salk. 692; and *Acebery* v. *Barton*, Salk. 693. But the 18 & 19 Vict. c. 41 abolishes the jurisdiction of ecclesiastical courts for defamation.

(*m*) Com. Dig. Prohibition (G.), 23; Per Lord *Ellenborough*, C. J., *Gould* v. *Gapper*, 5 East, 366; *Ex parte Medwin*, 1 E. & B. 609; *Ex parte Story*, 12 C. B. 767; Per Lord *Kenyon*, C. J., *Leman* v. *Goulty*, 3 T. R. 4; *Duke of Rutland* v. *Bagshawe*, 14 Q. B. 869.

Where the jurisdiction in the common law and ecclesiastical courts is concurrent, the proceedings in the

the remedy is by prohibition. This principle indeed of the pre-eminence of the common law is broadly laid down by Lord *Ellenborough*, C. J., when he says, "The Courts of common law have *in all cases* in which matter of a temporal nature has incidentally arisen, granted prohibitions to courts acting by the rules of the civil law, where such courts have decided on such temporal matters in a manner different from that in which the Courts of common law would decide upon the same" (*n*).

Prohibition to the temporal courts.

Prohibition to the temporal courts is limited to those cases where they act either without, or in excess of, jurisdiction (*o*). Thus the writ will not lie in respect of mere irregularities which may have occurred in the proceedings of the inferior court (*p*), nor because the judge, in deciding any particular question properly before him, has erred in his judgment upon the law (*q*); but the appli-

latter must be pro salute animæ, and to punish the sin, not to recover damages: Bac. Abr. Prohib. (L. 5).

(*n*) *Gould* v. *Gapper*, 5 East, 371; *Breedon* v. *Gill*, 5 Mod. 272; Bac. Abr. Prohibition (L. 5). But where the spiritual court has sole jurisdiction, its proceedings need not be governed by the rules of common law: Com. Dig. Prohibition (G.) 22.

(*o*) *Tinniswood* v. *Pattison*, 3 C. B. 243; *Lilley* v. *Harvey*, 5 D. & L. 648; *Zohrab* v. *Smith*, 5 D. & L. 639; *Jones* v. *Jones*, 5 D. & L. 628; *Marsden* v. *Wardle*, 3 E. & B. 695; *Thompson* v. *Ingham*, 14 Q. B. 710; *Re Bowen*, 21 L. J., Q. B., 10. *The Earl of Harrington* v. *Ramsay*, 8 Exch. 879; *S. C.*, 2 E. & B. 669. A prohibition will go to the county court for granting a new trial on a day subsequent to the day of trial: *Mossop* v. *Great Northern R. C.*, 16 C. B. 585; *S. C.*, Mich. T., 1855; ante, p. 69. *Guardians of Lexden* v. *Southgate*, 10 Exch. 201; with which compare *Hill* v. *Swift*, 10 Exch. 726; Judgm. *Bunbury* v. *Fuller*, 9 Exch. 140.

(*p*) *Ex parte Story*, 8 Exch. 195. But see *Ex parte M'Fee*, 9 Exch. 261.

(*q*) *Ex parte Rayner*, 5 C. B. 162; *Ellis* v. *Watt*, 8 C. B. 614.

See 13 & 14 Vict. c. 61, s. 22, in respect of the writ issuing to the judges of county courts.

As to writs of prohibition to the Admiralty Courts, see *In re Place*, 8 Exch. 704; *Lord Camden* v. *Home*, 4 T. R. 382; to the Vice-Chancellor &c. of the University of Cambridge, see *Ex parte Death*, 21 L. J., Q. B., 337; to sheriff and commissioners, under 9 & 10 Vict. c. 38, see *Chabot* v. *Lord Morpeth*, 15 Q. B. 446; to ma-

cant (*r*) may be put to declare in prohibition if the questions raised on the argument appear doubtful (*s*), or, perhaps, if it is required by the party against whom the application is made (*t*). In the declaration must be set forth the grounds on which the prohibition is demanded; to this declaration "the party defendant may demur or plead such matters by way of traverse or otherwise as may be proper to shew that the writ ought not to issue" (*u*), and the proceedings are then continued as in an ordinary action to judgment (*x*). If the verdict and judgment be for the plaintiff, the writ of prohibition issues (*y*), and all proceedings must be suspended, by those to whom it is directed, upon pain of attachment.

It only remains to notice that a prohibition may issue in some instances after judgment (*z*) has been given below, and though it cannot go after execution has been completed (*a*); yet when goods seized in execution remain unsold in the hands of the high bailiff, the writ may go to stay further proceedings (*b*).

gistrates to stay proceedings, even after conviction, *Rich* v. *Anderson*, 3 Ir. Ch. Rep. 463; *R.* v. *Burnaby*, 2 Ld. Raym. 900.

(*r*) As to who may apply for the writ, see Com. Dig. Prohibition (E.); 2 Inst. 607; *Wadsworth* v. *Queen of Spain*, and *De Haber* v. *Queen of Portugal*, 17 Q. B. 171; in cases of a criminal nature, see Corner Cr. Off. Prac. p. 246.

(*s*) *Ex parte Tucker*, 1 M. & G. 534; *Mossop* v. *Great Northern R. C.*, 16 C. B. 585.

(*t*) *Remington* v. *Dolby*, 9 Q. B. 167.

(*u*) 1 Will. 4, c. 21, s. 1.

(*x*) As to the time at which a prohibition should be applied for, see *Full* v. *Hutchins*, Cowp. 422; *Ricketts* v. *Bodenham*, 4 Ad. & E. 441; *Byerley* v. *Windus*, 5 B. & C. 1.

(*y*) If, after the writ has been issued, it appears to the Court, that it ought not to have been granted, a writ of consultation may go, which in fact resolves the prohibition: 18 Edw. 1, st. 2; 3 Bla. Com. p. 114.

(*z*) *Marsden* v. *Wardle*, 3 E. & B. 695; Com. Dig. Prohib. (D.); 2 Inst. 602.

(*a*) *Robinson* v. *Lenaghan*, 2 Exch. 333.

(*b*) *Kimpton* v. *Willey*, 1 L. M. & P. 280.

A clause containing an order of

Quo warranto.

4. The writ of Quo Warranto—now obsolete—was a writ of right of the Crown, issuing out of the Queen's Bench, and lay only in respect of an usurpation on the rights or prerogative thereof (*c*). Proceedings *by information* (*d*) *in the nature of a writ of quo warranto* are now substituted in the place of the ancient writ, and considerable light has been thrown upon their applicability and scope by the judgment in *Darley* v. *Reg.* (*e*), where it is said that the *writ* was wont to be brought for property of or franchises derived from the Crown; but the practice of filing *informations* also by the Attorney-General ex officio, in lieu of this writ, is very ancient (*f*). In modern times moreover (before the 9 Anne, c. 20, which regulated such proceedings, but did not, as has sometimes been said, first give rise to them,) informations have been exhibited by the King's coroner and attorney, at the instance of private prosecutors (*g*). By a previous statute (4 & 5 W. & M. c. 18), certain conditions had indeed been imposed in restraint generally of the filing of informations by private prosecutors; and under the provisions of this statute and of stat. 9 Anne, just referred to, the sanction of the Court must have been obtained prior to taking such proceedings (*h*),

restitution is sometimes inserted in a writ of prohibition: *Jones* v. *Owen*, 5 D. & L. 669.

(*c*) Per Lord *Kenyon*, C. J., *King* v. *Shepherd*, 4 T. R. 381.

(*d*) As to the meaning of the term 'information,' see post, p. 256 *l*.

(*e*) 12 Cl. & F. 520.

(*f*) As may be seen by referring to Coke's Entries.

(*g*) See the first reported case, in which the course was pursued, *R.* v. *The Mayor of Hertford*, 1 Ld. Raym. 426. See also *R.* v. *Gregory*, 4 T. R. 240, n. (*a*); *R.* v. *Williams*, 1 Burr. 402, where the right to file an information *at common law* by the king's coroner and attorney against a person for improperly holding a court of record, is recognised.

(*h*) See also 32 Geo. 3, c. 58; 7 Will. 4 & 1 Vict. c. 78; and 6 & 7

the judges exercising "a discretion to grant or refuse them to private prosecutors, according to the nature of the case" (*i*). The authorities are conflicting as to the circumstances under which the Court should thus exercise its discretion and allow the remedy in question, as regulated by the statute, to be employed. But in *Darley* v. *Reg.*, already cited, it is laid down that "this proceeding by information in the nature of *quo warranto*, will lie for usurping any office, whether created by charter alone or by the Crown with the consent of parliament, provided the office be of a public nature and a substantive office—not merely the function or employment of a deputy or servant held at the will and pleasure of others; for with respect to such an employment, the Court certainly will not interfere, and the information will not properly lie" (*k*).

What information will lie for.

Thus three tests of the applicability of the proceeding by information in the nature of a quo warranto are here presented—the source of the office, its tenure, and its duties (*l*); and, within the limits indicated in *Darley* v. *Reg.*, it is the appropriate civil (*m*) remedy to try disputes between private parties as to the authority by which an office or franchise should be held (*n*), and to oust those who have improperly assumed to exercise either (*o*).

Vict. c. 89. The older statutes regulating the writ of quo warranto are 6 Edw. 1, c. 1, and 18 Edw. 1, st. 2.

(*i*) Per *Tindal*, C. J., 12 Cl. & F. 538.

(*k*) Per *Tindal*, C. J., 12 Cl. & F. 541, 542; see per Lord *Brougham*, Id. 545. See also *R.* v. *Archdall*, 8 Ad. & E. 284, n. (*a*).

(*l*) Per *Erle*, J., *Reg.* v. *Guardians of St. Martin's*, 17 Q. B. 163; where see also the remarks of the other learned Judges upon *Darley* v. *Reg.*

(*m*) "Of late years a quo warranto information has been considered merely in the nature of a civil proceeding," and a new trial may therefore be had therein: *R.* v. *Francis*, 2 T. R. 484.

(*n*) Selw. N. P., 10th ed., p. 1149; *Ex parte Ramshay*, 18 Q. B. 173.

(*o*) *In re Harris*, 6 Ad. & E. 475. As to what may be brought under

Certiorari.

5. The writ of *certiorari* is sued out for the purpose of removing a suit from an inferior into one of the superior Courts of common law (*p*); it is directed to the Judge or officers of an inferior court, commanding him or them to return the record of a cause there depending, to the end that more sure and speedy justice may be done between the parties (*q*). The right of thus removing a cause exists at common law (*r*), but has been limited to some extent in its applicability by statute (*s*).

the notice of the Court by the Attorney-General, and what may be tried at the relation of a private individual, by leave of the Court, see per Lord *Tenterden*, C. J., *R.* v. *Ogden*, 10 B. & C. 233; *R.* v. *Corporation of Carmarthen*, 2 Burr. 869. See *R.* v. *M'Kay*, 5 B. & C. 640, 646; *R.* v. *White*, 5 Ad. & E. 613. With respect to who may be the relator, see *R.* v. *Hedges*, 11 Ad. & E. 163; *R.* v. *Quayle*, Id. 508; *R.* v. *Parry*, 6 Ad. & E. 810; *Reg.* v. *Alderson*, 11 Ad. & E. 3; Corner's Cr. Off. Pr. pp. 184, 185; and generally as to the pleading, evidence, and judgment in these proceedings, see Selw. N. P., 11th edit., vol. 2, p. 1177; 2 Hawk. P. C. c. 26, ss. 3, 4; 3 & 4 Will. 4, c. 42, s. 25.

(*p*) As to removing a judgment, rule, or order of an inferior court, by Judge's order, without a writ of certiorari, see 1 & 2 Vict. c. 110, s. 22.

To remove criminal proceedings, the writ issues in general from the Queen's Bench (Bac. Abr. Certiorari (A.)); but as to removing indictments to the Central Criminal Court, see 4 & 5 Will. 4, c. 36, s. 16; *Reg.* v. *Sill*, 1 Dearsl. 10. See also 5 & 6 Will. 4, c. 50, s. 95; *Reg.* v. *Inhabs. of Sandon*, 3 E. & B. 547.

(*q*) Bac. Abr. Certiorari (A.), (F.); *Landens* v. *Sheil*, 2 Dowl. 90; *Ex parte Phillips*, 2 Ad. & E. 586.

A certiorari cannot go as of course to a Court not of record. As to the proper mode of removing a suit from such a Court, see *Ex parte Phillips*, 2 Ad. & E. 586: *Edwards* v. *Bowen*, 5 B. & C. 206.

Interpleader proceedings in the county court cannot be removed by certiorari, *Ex parte Summers*, 18 Jur. (Exch.) 522.

(*r*) *Symonds* v. *Dimsdale*, 2 Exch. 533.

(*s*) See 21 Jac. 1, c. 23, s. 2; 1 & 2 P. & M. c. 13; 19 Geo. 3, c. 70, s. 4; 7 & 8 Geo. 4, c. 71; 9 & 10 Vict. c. 95, s. 90; 13 & 14 Vict. c. 61, s. 16. As to certiorari lying to county court, see ante, p. 241; *Reg.* v. *Hull Dock Co.*, 3 Railw. Cas., (Q. B.), 795; *Reg.* v. *Lancaster and Preston R. C.*, 6 Q. B. 759; *Brookman* v. *Wenham*, 2 L. M. & P. 233.

If the superior Court should consider that a cause has been thus improperly removed, it may issue a writ of *procedendo* (*t*), commanding the inferior court to proceed, or the writ of certiorari may be quashed on motion. Procedendo.

6. Proceedings by *interpleader* were devised by statute, "to enable Courts of law to give relief against adverse claims made upon persons having no interest in the subject of such claim" (*u*). For this purpose, it is enacted that, if a defendant sued in any action of assumpsit, debt, detinue, or trover, in the superior Courts of Westminster, shall, after declaration and before plea, shew that he does not "claim any interest (*v*) in the subject-matter of the suit, but that the right thereto is claimed (*w*) or supposed to belong to some third party, who has sued or is expected to sue for the same; and that such defendant does not in any manner collude (*x*) with such third party, but is ready to bring into Court, or to pay or dispose of the subject-matter of the action in such manner as the Court or any judge thereof may order or direct" (*y*); then the Court or judge may order such third party to appear and state the nature of his claim, and maintain or relinquish it; and the judge may further "order such third party to make himself defendant in the same or some other action," and also "direct which of the parties shall be plaintiff or defendant on such trial, or, with the consent of the plaintiff and such third party," "dispose of the merits of their claims, and determine the same in a summary manner" (*z*). Sheriffs and other officers, in execution Interpleader.

(*t*) *Reg.* v. *Scaife*, 21 L. J., M. C., 221.

(*u*) 1 & 2 Will. 4, c. 58.

(*v*) *Patorni* v. *Campbell*, 12 M. & W. 277.

(*w*) *Roach* v. *Wright*, 8 M. & W. 155.

(*x*) *Belcher* v. *Smith*, 9 Bing. 82.

(*y*) 1 & 2 Will. 4, c. 58, s. 1.

(*z*) Id.; *Deller* v. *Prickett*, 15 Q. B. 1081; Per *Pollock*, C. B., *Horton* v. *Earl of Devon*, 4 Exch. 499;

of process of the superior Courts, who are thereby exposed to the hazard and expense of actions, in respect of claims made to goods seized by assignees of bankrupts and other persons, may also apply to the Court for relief and protection by interpleader (*a*). And the advantage of these proceedings is now extended to suits in the county courts (*b*). When any similar claim is set up by a third party to goods taken in execution, the bailiff may there compel the execution creditor and the claimant to interplead (*c*), and the Court may dispose of the matter in dispute (*d*), including any question of trespass which may arise out of the execution in question (*e*).

Recovery of small tenements.

7. The summary proceedings which have been provided, for enabling a landlord to recover possession of small tenements from a tenant, who holds over after the determination of his term, may be taken before justices of the peace, under 1 & 2 Vict. c. 74, or before the judge of a county court, under 9 & 10 Vict. c. 95 (*f*). The former of these statutes applies where the premises are held at will, or for any term not exceeding seven years; and the tenant is liable either to

Dalton v. *Midland R. C.*, 12 C. B. 458; *Turner* v. *Mayor &c. of Kendal*, 13 M. & W. 171.

(*a*) 1 & 2 Will. 4, c. 58, s. 6; *Day* v. *Carr*, 7 Exch. 883; *Crump* v. *Day*, 4 C. B. 760; *White* v. *Binstead*, 13 C. B. 304; *Gadsden* v. *Barrow*, 9 Exch. 514; *Abbott* v. *Richards*, 15 M. & W. 194; *Hollier* v. *Laurie*, 3 C. B. 334.

And see 1 & 2 Vict. c. 45, giving to a judge the same powers as the Court for relief of sheriffs; *Figgin* v. *Langford*, 10 M. & W. 556; *Shortridge* v. *Young*, 12 M. & W. 5.

(*b*) Ante, p. 71.

(*c*) 9 & 10 Vict. c. 95, s. 118. See rules 81, 145, 146, 147, 148; *Reg.* v. *Stapylton*, 21 L. J., Q. B., 8; *Beswick* v. *Boffey*, 9 Exch. 315; *Ex parte M'Fee*, Id. 261.

(*d*) *Mann* v. *Buckerfield*, 2 L. M. & P. 60; *Fraser* v. *Fothergill*, 14 C. B. 298; *Bloor* v. *Huston*, 15 C. B. 266.

(*e*) *Tinkler* v. *Hilder*, 4 Exch. 187; *Jessop* v. *Crawley*, 15 Q. B. 212; *Cater* v. *Chignell*, 15 Q. B. 217.

(*f*) Sects. 122—127; reg. 199.

pay no rent or a rent under 20*l.* a year (*g*). Proceedings under the county court statute, which are commenced by plaint and summons, and refer only to the ordinary relation of landlord and tenant (*h*), are restricted to those tenancies, "where the value of the premises, or the rent payable," does not exceed the sum of 50*l.* a year; and upon the judge being satisfied, in such cases, of the wrongful holding over by the tenant, he issues his warrant of possession, which is authority for the "bailiff to enter upon the premises with such assistants as he shall deem necessary, and to give possession accordingly" to the landlord (*i*).

Specific delivery of chattels.

8. The power now given to a superior Court or judge to order a defendant, in an action for the detention of a chattel, to render it up to the plaintiff (*k*), may also be mentioned in connection with the subject of extraordinary remedies, inasmuch as it is applied for at the hands of the Court, when the plaintiff desires such restitution in lieu of compensation by damages. As this peculiar mode of procedure has, however, been already spoken of (*l*), it need not in this place be further adverted to.

Criminal information.

9. A *criminal information* is a proceeding in the Court of Queen's Bench (*m*), by which the Attorney-General or the Queen's attorney and coroner "gives the Court to under-

(*g*) Sect. 1. See *Jones* v. *Chapman*, 14 M. & W. 124.

(*h*) *Jones* v. *Owen*, 5 D. & L. 669; *Banks* v. *Rebbeck*, 2 L. M. & P. 452; *Crowley* v. *Vitty*, 7 Exch. 319; *Fearon* v. *Norvall*, 5 D. & L. 444; *Re Earl of Harrington*, 2 E. & B. 669; *Kerkin* v. *Kerkin*, 3 E. & B. 399.

(*i*) 9 & 10 Vict. c. 95, s. 122. And see Broom's County Court Pract., pp. 244—256.

(*k*) C. L. Proc. Act, 1854, s. 78.

(*l*) See ante, p. 122; *Pusey* v. *Pusey*, 1 Vern. 273, n. (1); *Wood* v. *Rowcliffe*, 2 Ph. 382.

(*m*) An information in the Court of Exchequer is brought in respect of property or revenue of the Crown, for intrusion, for breach of the excise laws, &c., see Manning's Exchequer Pract.

stand and be informed of" a misdemeanor. It differs from an indictment principally in this respect, that the latter is found and presented by the grand jury (*n*), "whereas an information is only the allegation of the officer who exhibits it" (*o*).

The Attorney-General has a right, ex officio, to file a criminal information in respect of *any* misdemeanor; but he rarely asserts this right, except when cases brought under his notice appear of so grave a character, that they affect good government, as being imminently dangerous to the public welfare or directly derogatory to the dignity of the Crown (*p*). An information on the other hand, filed at the relation of a private individual, by the Queen's coroner, is always in respect of some misdemeanor, which, though serious in its nature, assumes a character less formidable and flagitious. Nor can proceedings be taken in this latter mode without leave of the Court being first obtained, and security thereupon given to prosecute with effect, and pay costs to the defendant if he should be acquitted (*q*). The Court exercises its discretion in thus granting or refusing permission to file a criminal information, on reference to the nature of the offence alleged, and the surrounding circumstances. It will decline to allow an information to be

(*n*) Post, p. 992.

(*o*) Bac. Abr. Informations (A.).

As to the legality of informations at common law, and their prosecution in the Star Chamber, see *Prynn's case*, 5 Mod. 459. See also *Shower's* learned "intended argument," in *R.* v. *Berchet*, 1 Show. 107.

(*p*) *Reg.* v. *Douglas*, 13 Q. B. 42, 74; *R.* v. *Burdett*, 3 B. & Ald. 717; and 4 B. & Ald. 115; 2 Chitt. Crim. L., p. 88; *R.* v. *Harvey*, 3 D. & R. 464; and cases, note (*o*), supra. See 2 Hawk. P. C. c. 26; Bac. Abr. Inform. (B.).

(*q*) 4 & 5 W. & M. c. 18. But as to defendant recovering costs, see 6 & 7 Vict. c. 96; *Reg.* v. *Latimer*, 15 Q. B. 1077.

filed in respect of any trivial offence (*r*), or where the accused is a very poor person (*s*), or after unnecessary delay has occurred in applying to the Court (*t*); or generally, unless flagrant misconduct on the part of the alleged misdemeanant, and entire rectitude on the part of the applicant, be made apparent (*t*). The remedy in question is also granted by the Court in cases of gross libel on public bodies (*u*), or on the public conduct of individuals holding eminent position (as peers and members of the House of Commons (*x*)), or dignified office, (as judges and magistrates of the land (*y*)); and, in some cases, the Court will lend its protection, when private individuals and their families (*z*) have been subjected to malicious and excessive insult and slander. Criminal informations may also be filed against judges and magistrates, for illegal, unjust, and wilfully oppressive conduct, arising from corrupt and malignant motives (*a*), as distinguished from error of judgment.

Again, a criminal information lies for bribery or an attempt to bribe at a parliamentary or other public election (*b*), or for using means to pervert or vilify public justice (*c*), for

(*r*) Bac. Abr. Informations (A.).

(*s*) Per Lord *Mansfield*, C. J., *Anon.*, Lofft, 155.

(*t*) *R.* v. *Robinson*. 1 W. Bla. 541; *R.* v. *Jollie*, 4 B. & Ad. 867; *R.* v. *Hartley*, *R.* v. *O'Meara*, Id. 869, n. (*a*).

(*u*) *R.* v. *Williams*, 5 B. & Ald. 595; *R.* v. *Jenour*, 7 Mod. 400; *R.* v. *Osborne*, 2 Barnard. 166, 138, 2 Swanst. 502, n. (*c*).

(*x*) *R.* v. *Haswell*, 1 Dougl. 387.

(*y*) As regards slander on magistrates, see *Ex parte Chapman*, 4 Ad. & E. 773; 3 Chitt. Crim. L. 898; *Ex parte Duke of Marlborough*, 5 Q. B. 955.

(*z*) *Reg.* v. *Gregory*, 8 Ad. & E. 907; *R.* v. *Dennison*, Lofft, 148; *R.* v. *Benfield*, 2 Burr. 980.

(*a*) *R.* v. *Barker*, 1 East, 186; Per *Ashhurst*, J., *R.* v. *Jackson*, 1 T. R. 653; Per Lord *Campbell*, C. J., *R.* v. *Marshall*, 4 E. & B. 480; *R.* v. *Sainsbury*, 4 T. R. 457; *R.* v. *Borron*, 3 B. & Ald. 432; Per *Patteson*, J., *Ex parte Fentiman*, 2 Ad. & E. 129; Per *Ashhurst*, J., *R.* v. *Brooke*, 2 T. R. 190. See *Reg.* v. *Badger*, 4 Q. B. 468.

(*b*) *R.* v. *Isherwood*, 2 Lord Kenyon, 202.

(*c*) *R.* v. *Jolliffe*, 4 T. R. 285; *R.* v. *Watson*, 2 T. R. 199.

challenging another to fight a duel (*d*), or for grievous personal assault (*e*), and in some other cases (*f*).

It is important to observe, however, that the Court will never, even under circumstances such as those just indicated, lend its sanction to the employment of the extraordinary remedy in question, when he who seeks it has participated in any way in the misconduct complained of (*g*), nor where he does not come for the assistance of the Court "with clean hands" (*h*); nor if he has retaliated with the same weapons, of the use of which against himself he complains (*i*); nor if he has resorted to other means of obtaining redress or satisfaction (*k*). Hence, where an information is applied for in respect of a libel, the applicant must, in general, swear to his innocence of the imputations made against him (*l*); and, in all cases he must adduce, *in the first instance*, sufficient ground in support of his motion (*m*). Accordingly, a rule nisi for a criminal information is sometimes moved for by one who would clear himself from false and slanderous accusations, the main object

(*d*) *R.* v. *Larrieu*, 7 Ad. & E. 277.

(*e*) *R.* v. *Gwilt*, 11 Ad. & E. 587; and see case cited, note (*o*).

(*f*) Cole Crim. Inform. pp. 38—42.

(*g*) *R.* v. *Peach*, 1 Burr. 548; *R.* v. *Steward*, 2 B. & Ad. 12; *R.* v. *Gwilt*, 11 Ad. & E. 587.

(*h*) Per Lord *Mansfield*, C. J., Lofft, 315.

As to proceedings on criminal informations, see *Reg.* v. *Newman*, 1 E. & B. 268, 588; *S. C.* 1 Dearsl. C. C. 85.

(*i*) Per Lord *Denman*, C. J., *Reg.* v. *Proprietors of the Nottingham Journal*, 9 Dowl. 1043.

(*k*) *Ex parte Anon.*, 4 Ad. & E. 576, n. (*a*); *Reg.* v. *Marshall*, 4 E. & B. 475.

Where a rule nisi for a criminal information in respect of a libel is discharged in the Queen's Bench, the applicant is not precluded from bringing an action in another Court in respect of the same libel: *Wakley* v *Cooke*, 16 M. & W. 822.

(*l*) *R.* v. *Haswell*, 1 Dougl. 387; Cole Crim. Inform. p. 53.

(*m*) *R.* v. *Inhabitants of Barton*, 9 Dowl. 1022; *R.* v. *Eve*, 5 Ad. & E. 780.

of the applicant being simply to employ the opportunity thus afforded him of filing exculpatory affidavits (*n*).

The trial on a criminal information takes place on the civil side of the Court, evidence being gone into touching the facts which constitute the offence (*o*). If the defendant be found guilty, he may move for a new trial, or in arrest of judgment; but, should he take neither of these courses, matters of aggravation and extenuation may be gone into upon affidavit, when he is called up for judgment.

Habeas corpus.

10. The reader of English history, being necessarily familiar with the nature of the writ of *habeas corpus*, will readily understand wherefore it must be here considered amongst Extraordinary Remedies. The record of the struggles made to maintain this mode of relief in its full force and integrity, proves the value attached to it in former times. During the earlier epochs and stages in the growth of our constitution (*p*)—when legal rights were less perfectly defined or less capable of enforcement than they now are, and the various elements in the state were unsettled and ill-balanced—the virtue and applicability of the writ of habeas corpus were not unfrequently impugned, albeit as often vigorously re-asserted. It exists in these days, the most important remedy of the class now under notice, which a Court of common law can be called on to afford: a remark whereof the truth becomes more obvious, when it is remembered, that the writ here spoken of is adapted (*q*) to effect the great object enunciated in Magna Charta (*r*),

(*n*) Per Lord *Denman*, C. J., *Ex parte Duke of Marlborough*, 5 Q. B. 956.

(*o*) *R.* v. *Sharpness*, 1 T. R. 229; *R.* v. *Withers*, 3 T. R. 428; *R.* v. *Burdett*, 4 B. & Ald. 314, 319.

(*p*) See Hall. Const. Hist., 8th edit., vol. 3, p. 12.

(*q*) 4 Inst. 182, 290.

(*r*) 9 Hen. 3, c. 29, which is only declaratory of the common law, 2 Inst., Pref. 46.

that "no man shall be taken or imprisoned unless by lawful judgment of his peers or by the law of the land." How essential it was deemed to insist upon this great principle of common law may be seen, moreover, by reference to subsequent pages of the statute book. Thus the 25 Edw. 3, st. 5, c. 4, after reciting the above clause in Magna Charta, which is designated as "the great charter of our liberties,"—proceeds to enact, that thenceforth none shall be taken by petition or suggestion made to our Lord the King or to his council, unless it be by indictment or presentment of the good and lawful people of the same neighbourhood, or by process made on writ original at common law; and in another statute of the same reign (*s*) the like doctrine is again unequivocally declared.

On one memorable occasion (*t*), when the principle affirmed in Magna Charta and the practical method of asserting it (*u*) by writ of habeas corpus were contested, the arguments both of the bench and of the bar not only set forth elaborately the learning connected with the writ in question, but also shew in how many antecedent cases the liberty of the subject had been violated with impunity, and how important consequently it was, that the law which assumed to protect that liberty should be vindicated. It will be remembered, that one of the marked consequences of this case was the Petition of Right (*x*), which was followed by the statute abolishing the Star Chamber (*y*), and by an "Act for the better securing the liberty of the subject, &c.," usually styled the Habeas Corpus Act (*z*).

(*s*) 42 Edw. 3, c. 3.
(*t*) *Darnell's case*, 3 How. St. Tr. 1.
(*u*) 2 Inst. 55.
(*x*) 3 Car. 1, c. 1. See Hall. Const. Hist., 8th edit., vol. 1, p. 414; Macaulay, Hist. Eng., vol. 1, Chap. 2.
(*y*) 16 Car. 1, c. 10.
(*z*) 31 Car. 2, c. 2.

This latter enactment introduced no new principle into the law of England; there being abundant evidence, as already stated, to shew that the right to the writ, now spoken of, existed at common law (*a*). The provisions of the Habeas Corpus Act were, however, mainly levelled against this right being rendered inoperative, and against the keeping in illegal custody of those who had "been committed for criminal or supposed criminal matters," contrary "to the known laws of the land, whereby many of the king's subjects have been, and hereafter may be, long detained in prison in such cases where by law they are bailable, to their great charges and vexation" (*b*). The 2nd section, therefore, proceeds to enact how the writ shall be promptly returned and obeyed in all such cases of criminal or supposed criminal nature, unless the commitment be "for treason or felony, plainly and specially expressed in the warrant of commitment;" and in this latter case provision is made by the 7th section of the Act, for the speedy trial or discharge from imprisonment, either on or without bail, of the prisoner.

Another important statute (56 Geo. 3, c. 100, intituled "An Act for more effectually securing the Liberty of the Subject") relating also to the writ of habeas corpus, had for its object the extending of "the remedy of such writ and enforcing obedience thereunto, and preventing delays in the execution thereof," to those cases where persons are confined "*otherwise than for some criminal or*

(*a*) *Thomlinson's case*, 12 Rep. 104; *Ex parte Sandilands*, 21 L. J., Q. B., 342; *Ex parte Besset*, 6 Q B 481; *Leonard Watson's case*, 9 Ad & E. 731, cited infra, n. (*e*).

And see the Petition of Right, 3 Car. 1, c. 1.

(*b*) 31 Car. 2, c. 2, s. 1. See *Cobbett* v. *Slowman*, 9 Exch. 633; *S. C.*, 4 Exch. 747; Hall. Const. Hist., 8th edit., vol 2, pp. 352--3.

supposed criminal matter," except persons imprisoned for debt or by process in any civil suit (*c*).

It may be observed, that the writ of hab. corp. *ad subjiciendum*, to which the above statutes mainly refer and to which we are now confining our attention, is one only—though incomparably the most important—of a rather large class of writs of habeas corpus (*d*). Its object (*e*) being, as already indicated, to effect deliverance from illegal confinement (*f*), it commands the party detaining the prisoner to produce his body, with the true statement of the time of his caption and the cause of his detention (*g*). The writ is granted on motion out of any one of the superior Courts of common law, wherever probable and sufficient ground has been assigned for the interposition of its authority (*h*), and lies to.

How granted.

(*c*) Sect. 1.

(*d*) These other writs of habeas corpus (above referred to), are ad testificandum, ad prosequendum, ad satisfaciendum, ad respondendum, ad faciendum et recipiendum, &c. The writ ad faciendum et recipiendum (or, as it is sometimes called, of habeas corpus *cum causâ*) issues to bring up the person of a defendant who is in custody under civil process of an inferior court, and likewise to remove the suit, connected with which he has been taken in execution, into the superior Court, whence the writ has issued: *Mitchell* v. *Mitcheson*, 1 B. & C. 513: as to the difference between which proceeding and that by certiorari, see *Clerk* v. *Mayor &c. of Berwick*, 4 B. & C. 649; *Palmer* v. *Forsyth*, 4 B. & C. 401. See also 21 Jac. 1, c. 23; 1 & 2 P. & M. c. 13; 19 Geo. 3, c. 70; 7 & 8 Geo. 4, c. 71; 9 & 10 Vict. c. 95, s. 90.

(*e*) See further, as to the object to which this writ may be applied, Mr. Fry's Report of the *Canadian Prisoners' case; S. C.*, 5 M. & W. 32, 9 Ad. & E. 731; *Re Belson*, 7 Moo. P. C. C. 114; Corner Cr. Off. Pr. tit. Hab. Corp., and an Art. on the law touching habeas corpus in the Law Mag., November, 1855, p. 281.

(*f*) *Ex parte Child*, 15 C. B. 238; *In re Hakewill*, 12 C. B. 223.

(*g*) If this writ be issued to bring up the body of a person in private custody, as an infant or lunatic, the clause *cum causâ* is omitted: Tidd's Forms, 8th ed., p. 123; *Re Belson*, 7 Moo. P. C. C. 131--2.

(*h*) *Hobhouse's case*, 3 B. & Ald. 420; *Brenan's case*, 10 Q. B. 492; *Re Dunn*, 5 C. B. 215; *Re Cowgill*, 16 Q. B. 336; *Ex parte Bradbury*, 14 C. B. 15; *Re Catherine Newton*, 13

any part of the Queen's dominions; for the Sovereign, it has been said, ought to have an account why any of her subjects are imprisoned (*i*).

Return to the writ.

The return to the writ is made by producing the prisoner, and setting forth the grounds and proceedings upon which he is in custody (*j*). If this return is deemed to present sufficient matter in justification of the prisoner's detention, he is remanded to his former custody; if insufficient, he is discharged therefrom (*k*). The return cannot be traversed (*l*), nor need it be verified by affidavit (*m*); but its validity is determined upon argument (*n*) on the day of the return, though sometimes new matter is allowed to be introduced to guide the discretion of the Court (*o*). A writ of habeas corpus will indeed sometimes be quashed on the ground of irregularity or fraud, but not for matter that could have been properly returned to it (*p*).

Although the space—necessarily limited—which has been here devoted to a consideration of the writ of habeas corpus,

Q. B. 716; *Re Francis Newton*, 16 C. B. 97.

The rule for a hab. corp. is sometimes made absolute in the first instance.

(*i*) Bac. Abr. Hab. Corp. (B) 2; *R.* v. *Cowle*, 2 Burr. 834; *Carus Wilson's case*, 7 Q. B. 984; *Crawford's case*, 13 Q. B. 613.

(*j*) Disobedience to the writ is punishable by attachment, see Corner's Cr. Off. Pr., p. 116.

(*k*) *Re Douglas*, 3 Q. B. 825; *Hammond's case*, 9 Q. B. 92.

(*l*) Corner Cr. Off. Pr. pp. 116, 117.

(*m*) Per *Jervis*, C. J., in *Re Hakewill*, 12 C. B. 228. And see the above point fully discussed in the Law Mag. Nov. 1855, pp. 287—289.

(*n*) As to what is a sufficient return to the writ, see *The Canadian Prisoners' case*, ubi supra; *Re Hakewill*, 12 C. B. 228; *Re Eggington*, 2 E. & B. 707; *Dimes's case*, 14 Q. B. 554; *Clarke's case*, 2 Q. B. 619; *Ex parte Andrews*, 4 C. B. 226; *Carus Wilson's case*, 7 Q. B. 984; *Crawford's case*, 13 Q. B. 613.

(*o*) *Re Eggington*, 2 E. & B. 717; *Re Hakewill*, ubi supra; Per *Patteson*, J., in *Carus Wilson's case*, 7 Q. B. 1010.

(*p*) *Carus Wilson's case*, 7 Q. B. 984, 1001; and see *In re Power*, 2 Russ. 583; *In re Clarke*, 2 Q. B. 619.

would be deemed wholly inadequate thereto, if measured solely by reference to the importance of the subject matter of the theme, its nature and practical effect, as well as its value in a constitutional point of view, have been to some extent indicated and explained, and may fully be appreciated on reference to the various authorities which have been cited. Under proper regulation and restraint, the writ has proved a safeguard inferior to none afforded by our constitution, whether for the protection of the subject when threatened by the Crown, or generally for the preservation of the weaker members of society from the oppression of the strong. In all cases, remarks Mr. Selden (*q*) where any right or liberty belongs to the subject by any positive law—written or unwritten—if there were not also a remedy by law for the enjoying or regaining of that right or liberty when violated or taken from him, the positive law were most vain and to no purpose; and as regards the right to liberty of the person, if there were not a remedy available in case of restraint, it were vain to speak of laws ordaining that it was not to be restrained. But there are in law divers remedies for the enlarging of a freeman imprisoned, amongst which the most common and best known, and (as above shewn) the most practically beneficial, is that by habeas corpus.

(*q*) See his argument in debate on the Petition of Right, 3 How. St. Tr. 95

BOOK II.

OF CONTRACTS.

CHAPTER I.

OF CONTRACTS GENERALLY—THEIR CLASSIFICATION AND ATTRIBUTES.

Meaning of term "contract."

In its widest and most general sense, the word Contract signifies an engagement, obligation (*a*), or compact (*b*),—which may be either unilateral or inter partes (*c*).

A contract may be *of record,—special* or *simple:* if simple, it requires a 'consideration' to support it (*d*). Before, however, treating of or even attempting to discriminate between the specific kinds of contracts just mentioned, I shall offer some remarks touching contracts generally, and the legal properties inherent in them.

(*a*) Obligationum substantia in eo consistit, ut alium nobis obstringat ad dandum aliquid, vel faciendum, vel præstandum: D. 44. 7. 3, pr.

"A contract is a transaction in which each party comes under an obligation to the other, and each reciprocally acquires a right to what is promised by the other:" 1 Powell Contr. pp. 6, 7.

(*b*) Roget Thesaur. (768, 769).

(*c*) Contractus proprie ultro citroque obligatio, quam Græci συνάλλαγμα vocant: Brisson. ad verb. Contractus.

Omnem obligationem pro contractu habendam, existimandum est; ut, ubicunque aliquis obligetur, et contrahi videatur; quanvis non ex crediti causâ debeatur: D. 5. 1. 20.

(*d*) The definition of a 'consideration' is given in connexion with the subject of simple contracts, post.

In the first place, then, I must observe, that a contract or compact between two or more parties (*d*) may be *executory* or *executed,—express* or *implied.*

Contract, executory—executed.

An *executory* contract is one in which a party binds himself to do or not to do a particular thing (*e*). A contract *executed* is one in which the 'object of contract' is performed (*f*). "If A. agrees to change horses with B., and they do it immediately, in which case the possession and the right are transferred together," we have before us an instance of an executed contract. If A. and B. agree to exchange horses next week, 'here the right only vests, and their reciprocal property is not in possession but in action' (*g*); the contract accordingly, in this latter case, is executory only. It will be well to add, that a contract may be executed as regards one of the parties to it, and executory as regards the other; as, for instance, if A., on the actual delivery and receipt of B.'s horse, promises and undertakes to deliver over his own horse to B. in the course of the week ensuing (*h*).

Upon an executed, as well as upon an executory contract, a right of action may be founded; and the former as well as the latter may contain obligations binding in futuro on the parties to it; ex. gr. a grant in its own nature

(*d*) *Fletcher* v. *Peck*, 6 Cranch (U. S.) R. 136. Et est pactio, duorum pluriumve in idem placitum consensus: D. 2. 14. 1, s. 2.

(*e*) An executory contract is an agreement between two or more persons, in which each party binds himself to do or to forbear from doing some act, and each acquires a right to what the other promises: Vide Webster's Dict. ad verb. Contract; ante, p. 257, n. (*a*).

(*f*) *Fletcher* v. *Peck*, supra. A contract executed is usually described by some particular term applicable to its nature, as a sale, a grant, a lease, an assignment, or mortgage, or the like: 1 Powell Contr. p. 234.

(*g*) 2 Bla. Com. 443.

(*h*) A contract, however, is usually said to be executory either when one party performs and the other is trusted, or when neither party performs but each trusts the other: 1 Powell Contr. p. 235.

amounts to an extinguishment of the right of the grantor, and implies a contract not to re-assert that right, so that a party is technically said to be estopped by his own grant (*i*).

Contract, express;

An *express* contract is one of which the terms are, at the time of making it, defined in writing or openly uttered and avowed (*j*), as where an agreement is entered into whereby either of the parties to it promises the other that something is done already or shall be done at some future time (*k*), or where goods of a certain kind and quality are ordered,—to be paid for at a specified rate.

—implied.

An *implied* contract, on the other hand, is one "which reason and justice dictate, and which the law, therefore, presumes that every man undertakes to perform" (*l*). In it, accordingly, the law implies, from the antecedent acts of persons, what their obligations are to be; whereas, if an express contract be made, the parties themselves thereby define or assume to define them.

In the case of an implied contract, however, the law does not vary or introduce new terms into an existing agreement or compact; it merely declares, that particular acts, unaccompanied or unexplained by express stipulations, give rise to particular duties or liabilities; and it then proceeds as if the parties had precisely stipulated for their performance. Thus, to take the example of an implied contract, which Sir W. Blackstone gives (*m*): "If I employ a person to do any business for me or to perform any work, the law implies that I undertook or contracted to pay him as much as his labour deserves;" and such amount may be recovered from me just as surely as if there had been a written agreement

(*i*) Per *Marshall*, C. J., *Fletcher* v. *Peck*, 6 Cranch (U. S.) R. 137.

(*j*) 2 Bla. Com. 443.

(*k*) See Woodf. L. & T., 6th ed., 77.

(*l*) 2 Bla. Com. 443. See *Pell* v. *Daubeny*, 5 Exch. 955.

(*m*) 2 Com. 443.

between the other party and myself to that effect. If, however, I am desirous beforehand that the work in question should be done for a fixed sum, I ought to have an express agreement specifying it, and so limiting and defining my liability.

To exhibit the purport of what has been just said in a somewhat different form, contracts, whether express or implied, are founded upon the actual agreement of the parties, the only distinction between them being in regard to the mode of proof. In an implied contract the law only supplies that which, although not stated, must be presumed, so as to complete the agreement intended by the parties. As where a person avails himself of the benefit of services done for him, although without his positive authority or request, the law supplies the formal words of contract, and presumes him to have promised an adequate compensation. So where a person buys an article without stipulating for the price, he is presumed to have undertaken to pay its market value or what it is fairly worth; and where he holds the money of another as trustee or bailee, the law supposes a promise to restore it (*n*). I shall hereafter have occasion to consider, at some length, under what circumstances contracts may thus be implied between parties.

Consent is of the essence of contract.

Bearing in mind, then, what a contract is, and what is meant by a contract 'executory' or 'executed'—'express' or 'implied,' I must in the next place observe, that a contract is founded on *consent*,—on the aggregatio mentium or "union of minds in regard to some particular matter." It is of the essence of every contract or agreement, that the parties to be bound thereby should consent, expressly or impliedly, to whatever is stipulated therein; for otherwise

(*n*) See *Beirne* v. *Dord*, 1 Selden (U. S.) R. 102.

no obligation nor reciprocal right can be created between them (*o*). To this effect the civil law lays down, that, in omnibus rebus quæ dominium transferunt, concurrat, oportet, affectus ex utrâque parte contrahentium: nam sive ea venditio, sive donatio, sive conductio, sive quælibet alia causa contrahendi fuit, *nisi animus utriusque consentit*, perduci ad effectum id quod inchoatur, non potest (*p*).

The law of contracts accordingly will be found to fall under the first of the three subdivisions of the *jus privatum* of the Romans. The *jus privatum*, it will be remembered, was that particular part of the Roman law which concerned the rights of individuals—*jus privatum est quod ad singulorum utilitatem spectat* (*q*); and, as we read in the Digest, *omne jus aut consensus fecit, aut necessitas constituit, aut firmavit consuetudo* (*r*). Now, a contract or agreement may, with the most perfect accuracy, be said to be synonymous with *jus quod consensus fecit*,—to be a law which the parties have framed and voluntarily prescribed to themselves for their own guidance.

Incapacity to contract.

Consent obviously implies acquiescence of the mind in something proposed or affirmed. The term involves, in contemplation of law, the existence of a physical and moral power of assenting, as well as a deliberate and free exercise of such power. Hence, the absence of any of these capacities in either of the parties to a contract, renders the person labouring under it incapable of binding himself thereby (*s*).

Legislative prohibitions.

But, besides incapacity to contract arising from any one of the causes just indicated, the law sometimes interferes to prohibit the making of certain kinds of contracts, or to an-

(*o*) 1 Powell Contr. p. 9.
(*p*) D. 44. 7. 55.
(*q*) I. 1. 1. 4; D. 1. 1. 2.
(*r*) D. 1. 3. 40.
(*s*) See 1 Powell Contr. p. 10.

nul them if made. The law, says Mr. Justice *Maule*, in a recent case (*t*), does not often interfere to prevent persons, who have attained their majority, from contracting in any way they think proper. Generally speaking, the rule is, that people may contract as they please. "That is the general law of the land. But occasionally there occur in the course of experience cases in which it is found desirable to depart from that general principle—cases of particular inconvenience in particular trades or employments, and with reference to particular classes: for instance, in the case of seamen, whose contracts are the subject of special legislative provisions—the law considering that particular class of men to be in a state of perpetual pupillage."

So, again, with reference to the Truck Act (1 & 2 Will 4, c. 37), the learned Judge, whose words I have just quoted, takes occasion to remark, that the intention of that statute was to "afford protection to a class of persons not very well able to protect themselves;" and he observes, that the restriction imposed by that enactment was found necessary, inasmuch as the leaving to parties the unfettered right to contract in respect of labour in such way as they may choose, is, in certain trades, replete with mischief and inconvenience (*u*).

The foregoing observations will, for the present, amply suffice to shew, that the capacity to contract, which, as a general rule, is inherent in every man, is sometimes partially abrogated by the legislature with a view to protecting and benefiting particular classes of the community.

Even where the legislature does not expressly interfere to prohibit contracts, acknowledged principles of law may

(*t*) *Sharman* v. *Sanders*, 13 C B. 166, 176.

(*u*) Per *Maule*, J., 13 C B 176. See also *Weaver* v. *Floyd*, 21 L. J., Q. B., 151, *Riley* v. *Warden*, 2 Exch 59

operate in such a manner as materially to vary or qualify them; and it has sometimes been made a question, whether the existing law of the land, by tacit consent of the parties, enters into and makes part of the contract, so as to derive its force and obligation from consent, which, as already mentioned, is of the essence of a contract; or whether it is the law which follows, accompanies, and regulates the construction of the contract.

Lex loci — how it operates.

Sometimes, no doubt, parties may be presumed to have contracted with reference to, and to have tacitly intended to be bound by, the lex loci: for instance, if A. promises by a written instrument, worded in the form of a promissory note, to pay to B. or order 100*l.* at sixty days after sight, the sum specified will, by operation of law, become really due and payable sixty-three days after sight; and, in the case here put, both the payee and the maker of the note may reasonably be supposed to have had the rule of the Law Merchant in their contemplation.

Cases may, however, occur, where contracting parties, ignorant of the rules of law, find their expressed intentions thwarted and defeated thereby; and where the lex loci may be considered as governing the contract, not by consent of the parties, but by its own superior force and efficacy (*x*).

Two ordinary instances will suffice in illustration of the foregoing remark, and may serve to throw some further light upon the doctrine of consent in reference to contracts as well as upon the mode in which the lex loci operates upon them. Let us suppose that a mortgagor stipulates that the mortgagee shall have the land mortgaged absolutely, if the debt be not paid at the time stipulated; here,

(*x*) See this question discussed: Judgm. 7 Cushing (U. S.) R. 30-1.

the lex loci, nevertheless, steps in and declares, that the mortgagee's title shall not be absolute, but that the estate shall be redeemable, although the mortgage debt be, in fact, not repaid at the time appointed. So, if a man, in consideration of an immediate loan of 50*l.*, binds himself in a penalty of 100*l.* to repay the 50*l.* within a year, and makes default, the lex loci will require him to pay the 50*l.* with interest only.

Now, in each of the foregoing cases, the law of the land overrules to some extent, and governs, the particular contract entered into; so that it would not even be competent to the contracting parties, by any express stipulation, altogether to exclude its operation (*y*). In the sense, therefore, indicated by the preceding remarks, it will be true to say, that every contract is founded on consent, and governed by the lex loci.

Obligatory force of contract.

Assuming, however, that contracts are thus mainly founded on consent, what, it may naturally be asked, is it which gives to a contract its binding force and legal efficacy? Contracts and agreements, it may be said, are in their terms and language infinitely diversified; they deal with matters of every conceivable kind, and impose upon parties liabilities correspondingly various, such, indeed, as no human law, statutory or customary, could possibly have anticipated or devised. There can be no doubt that the obligatory force of contracts is in every civilised country derived tacitly from the law, by reason of the manifest necessity which exists, with a view to the well-being of the community, that every man should fairly and honestly perform what he has undertaken to do (*z*). No state, perhaps, ever

(*y*) 2 Bla. Com. 160, n.; Leg. Max. 2nd ed. pp. 544, 545.

(*z*) Quid enim tam congruum fidei humanæ, quam ea, quæ inter eos placuerunt, servare: D. 2. 14. 1, pr.

declared, by statute or positive law, that contracts shall be obligatory; but all states, assuming the pre-existence of the obligation of contracts, have superadded merely, by municipal law, the means of carrying the pre-existing obligation into effect (*a*).

So far back, it has been said (*b*), as human research carries us, we find the judicial power, as a part of the executive, administering justice by the application of remedies to violated rights or broken contracts. We find that power applying these remedies, on the idea that there is a pre-existing obligation imposed on every man to do what he has promised to do; that the breach of this obligation is an injury for which the injured party has a just claim to compensation; and that society ought to afford him a remedy for that injury. We find allusions to the mode of acquiring property, but we find no allusion, from the earliest time, to any supposed act of the governing power giving obligation to contracts; and hence we may infer, that the doctrine in question is coeval with the existence of society, and, although it may be controlled, was not given by human legislation (*c*). *Obligatio*, as we read in the Institutes of Justinian (*d*), *est juris vinculum quo necessitate astringimur alicujus rei solvendæ secundum nostræ civitatis jura. Natural* law says, that contracts (if not impeachable on special grounds,) shall be binding; and *municipal* law indicates the manner in, or means by, which they may be enforced.

But although it is true that natural law and moral duty, acknowledged by the dictates of conscience, bind men to

(*a*) *Ogden* v. *Saunders*, 12 Wheaton (U. S.) R. 213. See also *Cook* v. *Moffatt*, 5 Howard (U S.) R 295.

(*b*) Per *Marshall*, C. J., *Ogden* v. *Saunders*, supra.

(*c*) Id.

(*d*) Lib. 3, tit. 14.

keep faith and to perform their engagements, yet the duty thus cast upon them is not defined with sufficient precision and exactness to form a practical rule for the government of society in the various exigencies daily occurring. For instance, the law of nature requires that a person competent in point of age to make a promise or contract shall be bound by it; but it does not approach to the determination of the question, what shall be the age of majority (*e*), —a question which has, consequently, to be determined by positive arbitrary enactment.

It seems, then, in regard to the obligatory force of a contract, correct to say, that both municipal law and moral obligation concur in constituting it. And this is true, as well in regard to contracts made and to be executed within the state or country where the remedy is sought, as to those which are to be executed, or upon which the remedy is sought, in a state or country where the contract was not made. Universal law and natural obligation on the one hand, and municipal law on the other, are not antagonistic to each other. On the contrary, municipal law assumes the existence of moral duty arising from natural law, and regulates it so that it may form a plain and practical rule, adapted to the exigencies of a civilised community (*f*).

I have thus far used the term 'obligation' as equivalent to "binding force" or "*vinculum juris*," and as consisting in the efficacy of the law which attaches to the contract, and, if it cannot enforce its performance, at all events gives pecuniary compensation in lieu of performance; but it must be remembered, that the word 'obligation' is also used as correlative to 'right,' so that 'whatever I, by my contract, give another a *right* to require of me, I thereby lay myself

(*e*) Judgm. 7 Cushing (U. S.) R. 32.

(*f*) *May* v. *Breed*, 7 Cushing (U. S.) R. 31; 1 Bla. Com. 54.

under an *obligation* to give or to do.' This secondary meaning of the term in question flows immediately from its *primary* signification already adverted to. There can, indeed, be no legal duty or obligation unless there be a legal mode of compelling its performance, and a contract imposes no *obligation* upon parties, unless it be a contract *recognised as valid* by the law.

The requisites of a valid contract will become more apparent as we advance through this part of the volume; and, without pausing just now to inquire concerning them, I will conclude my remarks, introductory to the subject of contracts, with one observation,—that a contract will not be considered as fulfilled, nor its obligation as discharged, save by compliance with the requirements of law in relation thereto; or, to exhibit the same proposition more concisely, a contract must be performed *secundum nostræ civitatis jura* (*g*),—in that manner which the law prescribes, and in that sense which the law puts upon its language.

Law, indeed, to some considerable extent, gives to a contract its character, makes it what it is, regulates its limits and obligation, fixes the time when it shall commence, how it shall be executed or satisfied, and how it shall be terminated and discharged (*h*).

Classification of contracts.

Contracts may properly be classified under three heads: 1st. Contracts of record, such as judgments, cognovits (*i*),

(*g*) Ante, p. 265.

(*h*) See 7 Cushing (U. S.) R. 37.

(*i*) A cognovit is a written confession of an action, supposed to be given by the defendant in Court, which authorises the plaintiff, under circumstances specified, to enter up judgment and issue execution thereon against the defendant: 2 Chitt. Arch. Pr., 8th ed., p. 844. The R. G. H. T., 17 Vict., contain certain provisions (reg. 25—28) relative to cognovits and warrants of attorney.

and recognisances (*k*); 2ndly. Contracts by specialty or under seal, which admit of subdivision into contracts unilateral, as bonds; and contracts inter partes, as indentures of demise; 3rdly. Simple contracts or contracts not under seal, which are either written or verbal.

The three great classes of contracts just specified have been advisedly arranged as above, for this reason, that contracts of record must be considered as of a higher nature than contracts of any other kind; and special, as superior in efficacy to simple contracts. With this preliminary remark, I shall at once proceed to point out the peculiar characteristics of each of the three great classes of contracts above mentioned.

Contracts of record.

Of contracts of record, the most practically important kind is that constituted by the judgment of a Court of record of competent jurisdiction (*l*). A judgment of one of the superior Courts of common law (for to the consideration of this species of contracts of record I shall now confine my-

(*k*) A recognisance is an obligation of record entered into before some Court of record or magistrate duly authorised, with condition to do some particular act: 2 Bla. Com. 341.

A recognisance may be entered into either to the Crown—as, where a person enters into recognisances to appear to answer a criminal charge; or to a subject—as where bail is given. A recognisance by statute is either founded on a statute merchant or statute staple, or is in nature of a statute staple under the 23 Hen. 8, c. 6: 3 Rep. 11, note (*a*); post.

A judgment of a Court of record is said to be of a higher nature than a statute staple, statute merchant, or any recognisance acknowledged by assent of the parties without judicial proceeding: 6 Rep. 45 b. As to the effect of a statute staple, see, further, Judgment, *Ellis* v. *Reg.* 6 Exch. 925, *S. C.*, 4 Exch. 652.

(*l*) "A debt of record is a sum of money which appears to be due by the evidence of a Court of record. Thus, when any specific sum is adjudged to be due from the defendant to the plaintiff on an action or suit at law; this is *a contract of the highest nature*, being established by the sentence of a Court of judicature:" 2 Bla. Com. 465.

self) has these peculiar properties or characteristics: It effects or works a merger of the original cause of action; it operates as an estoppel, and is conclusive as between the parties to it; it does not need any consideration to support it; it binds the land of the judgment debtor.

Merger.

The true nature and effect in regard to the doctrine of merger of a judgment at common law will be apparent from the following remarks:—Let us suppose that there has been a breach of some specific contract entered into between A. and B. A. being the contractee, and B. the party who has failed to perform his contract; now, if A. recovers a verdict for damages against B., and signs final judgment thereupon, A.'s cause of action in respect of the breach of contract ceases to exist,—it becomes merged in the judgment. So, if judgment be recovered for a debt due by bond, the debt thus due becomes "by judicial proceeding and act in law," "transformed and metamorphosed into a matter of record" (*m*); upon which latter security, *whilst it remains in force and unreversed* (*n*), the plaintiff's remedy, if any, must, in such manner as the law allows, be had.

The doctrine of merger now under consideration is clearly explained by the Court of Exchequer in *King* v. *Hoare* (*o*) in these words:—"If there be a breach of contract or wrong done, or any other cause of action, by one against another, and judgment be recovered in a Court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result." Hence

(*m*) *Higgens's case*, 6 Rep. 45.

(*n*) A judgment of the House of Lords can only be reversed or corrected by Act of Parliament: *Tommey* v. *White*, 3 Ho. L. Cas. 49.

(*o*) 13 M. & W. 494, 504.

the legal phrase *transit in rem judicatam* derives its force and aptitude; "the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher." The above remarks equally apply "where there is but *one cause of action*, whether it be against a single person or many. The judgment of a Court of record changes the nature of that cause of action, and prevents its being the subject of another suit, and the cause of action being single cannot afterwards be divided into two." It was held accordingly, in the case whence the above extracts are taken, that a judgment, even without satisfaction, recovered against one of two joint debtors, is a bar to an action against the other (*p*).

The doctrine of merger, as above explained, holds, it must be remembered, not merely where the original action was founded upon contract, but also where it was founded upon a tort or 'wrong independent of contract'; the judgment in this latter case, as well as in the former, when obtained, constituting a *contract of record*, in which the right of action ex delicto is wholly merged, "if," therefore, "one hath judgment to recover in trespass against *one*, and damages are certain," (that is, converted into certainty by the judgment,) "although he be not satisfied, yet he shall not have a new action for this trespass. By the same reason, e contrà, if one hath cause of action against *two*, and obtain judgment against one, he shall not have remedy against the other" (*q*).

(*p*) *King* v. *Hoare*, 13 M. & W. 494, with which compare *Henry* v. *Goldney*, 15 M. & W. 494. In *Morgan* v. *Price*, 4 Exch. 619, *Parke*, B., remarks:—"Suppose two persons *jointly and severally* liable to a party who recovers the whole amount from one of them, he cannot sue the other."

(*q*) Per *Popham*, C. J., *Broome* v. *Wooton*, Yelv. 67; *S. C.*, Cro. Jac. 73, cited 13 M. & W. 504, 505; *Lindall* v. *Penfold*, 1 Lev. 19.

We may then conclude, that "where judgment has been obtained for a debt as well as for a tort, *the right given by the record* merges the inferior remedy by action for *the same debt or tort* against another party" (*r*).

Estoppel by matter of record.

The next peculiarity to notice in a contract of record is, that "a record imports in itself truth" (*s*), and concludes all men against whom it is producible from denying anything appearing within the record (*t*); so that, if an action be brought, and the merits of the question at issue be discussed between the parties, and a final judgment be obtained by either, the parties are concluded and cannot canvass the same question again in another action, although, perhaps, some objection or argument might have been urged upon the first trial, which would have led to a different result (*u*). A judgment then obtained inter partes will estop either of those parties from again agitating the matter decided between them (*x*). But, according to the well-known rule—*res inter alios acta alteri nocere non debet*—a judgment cannot be used to fix with liability one who is neither a party nor privy to it, who has had no opportunity to cross-examine the witnesses called upon the trial, or to dispute the conclusions to be drawn from the evidence there offered (*y*).

(*r*) Judgment, *King* v. *Hoare*, 13 M. & W. 506.

(*s*) A record thus importing "credit and verity" "shall be tried only by itself," i. e. by production and inspection, the reason being, that there may thus be an end of controversy: 1 Inst. 260. a.; Leg. Max., 2nd ed, 242.

(*t*) *Hynde's case*, 4 Rep. 71 b.

(*u*) Per Lord *Kenyon*, C. J., *Greathead* v. *Bromley*, 7 T. R. 456.

(*x*) For information upon the subject here alluded to the reader is referred to the *Duchess of Kingston's case*, 2 Smith L. C. 424, and the note thereto. A judgment on the same point between the same parties is, *if pleaded by way of estoppel*, conclusive—where there is no opportunity of pleading it, it would seem to be conclusive *as evidence*: Id. pp. 444–5. See judgment, *Boileau* v. *Rutlin*, 2 Exch. 681; *Hutt* v. *Morrell*, 3 Exch. 240; *Guest* v. *Warren*, 23 L. J., Exch., 121.

(*y*) Judgment, *King* v. *Norman*, 4 C. B. 898; *Overton* v. *Harvey*, 9

But although, as between the parties to it, a judgment is thus conclusive, it is clearly impeachable on the ground of fraud or of deception practised on the Court; for, as remarked in the *Duchess of Kingston's case* (*z*), "fraud is an extrinsic collateral act which vitiates the most solemn proceedings of Courts of justice. Lord *Coke* says (*a*) it avoids all judicial acts, ecclesiastical or temporal." To a like effect the Court of Queen's Bench, in *Philipson* v. *Earl of Egremont* (*b*), observe that "fraud, no doubt, vitiates everything; and the Court, upon being satisfied of such fraud, has a power to vacate, and would vacate, its own judgment," a remedy being afforded to the aggrieved party by motion to the Court, or in some cases—ex. gr. to a declaration in scire facias—by plea (*c*).

No consideration necessary to support judgment.

No consideration is necessary to support an action founded upon a judgment—inasmuch as whilst the judgment remains in force, a legal liability to pay has been already ascertained thereby. Debt will, consequently, lie upon the judgment of a Court of record (*d*), or the judgment may, according to circumstances, be proceeded upon by scire facias or by writ of revivor (under various provisions of the Common

C. B. 324. See *Reg.* v. *Ambergate, N. & B. R. C.*, 1 E. & B. 372; *Reg.* v. *Haughton*, Id. 501; *Callow* v. *Jenkinson*, 6 Exch. 666.

(*z*) 2 Smith L. C. 431-2.

(*a*) *Fermor's case*, 3 Rep. 78 a.

(*b*) 6 Q. B. 587, 605, citing *Bradley* v. *Eyre*, 11 M. & W. 450.

(*c*) *Philipson* v. *Earl of Egremont*, 6 Q. B. 587, 604. Per *Tindal*, C. J., *Fowler* v. *Rickerby*, 2 M. & Gr. 777; per *Parke*, B., *Re Place*, 8 Exch. 704; *De Medina* v. *Grove*, 10 Q. B. 152, 168; per *Marshall*, C. J., *Simms* v. *Slacum*, 3 Cranch (U. S.) R. 305. "There is no doubt of the jurisdiction of Courts of equity to grant relief against a former decree, where the same has been obtained by fraud and imposition; for these will infect judgments at law and decrees of all Courts; but they annul the whole in the consideration of Courts of equity:" Story Eq. Pl. 3rd ed., s. 426; Id. ss. 780—784: *Earl of Bandon* v. *Becher*, 3 Cl. & F. 479, 510; See also *Dodgson* v. *Scott*, 2 Exch. 457.

(*d*) See Argument, *Prince* v. *Nicholson*, 5 Taunt. 667; 1 Chitt. Pl., 7th ed., p. 124.

Law Procedure Act), or it may be enforced by execution in the ordinary manner.

Judgment binds the land.

A judgment obtained in a Court of law now binds the land of the debtor of which he was seised or possessed at the time of entering up the judgment or at any time afterwards (*e*). Before, however, lands which have passed into the hands of purchasers can be affected by a judgment obtained against the vendor under the provisions of the statutes below cited, the name, abode, and description of the debtor, with the amount of the debt or damages and costs recovered against him, together with the date of registration and other particulars, are required to be registered in an index, which the Act directs to be kept for the warning of purchasers at the office of the Court of Common Pleas (*f*). The registration here adverted to, in order that it may be effectual, must be repeated every five years (*g*); and even if a purchaser of land should have express notice of any such judgment recovered against the vendor, he will not be affected by it unless and until a minute of such judgment shall have been left at the office aforesaid for entry in the register there kept (*h*).

Contracts under seal—general remarks as to.

A *contract under seal* or *specialty* is a contract in writing, the execution whereof is accompanied with certain solemnities which give to it peculiar force and efficacy (*i*).

(*e*) 1 & 2 Vict. c. 110, s. 13; Sugd. V. & P., 11th ed., 663.

(*f*) 1 & 2 Vict. c. 110, s. 19; 2 & 3 Vict. c. 11, s. 3.

(*g*) 2 & 3 Vict. c. 11, s. 4.

(*h*) 3 & 4 Vict. c. 82, s. 2; Williams' Real Property, 3rd ed., pp. 68-9. As to the conclusiveness of a foreign judgment see *Bank of Australasia* v. *Nias*, 16 Q. B. 717; *Thompson* v. *Bell*, 23 L. J., Q. B., 159.

(*i*) The strict definition of a deed, as given in Shepp. Touch. p. 50, is this:—"A writing or instrument written on paper or parchment, sealed and delivered, to prove and testify the agreement of the parties whose deed it is to the things contained in the deed."

This instrument, when used between private persons, as Blackstone tells us (*k*), is called a deed (factum) "because it is the most solemn and authentic act that a man can possibly perform with relation to the disposal of his property," or with a view to affecting in any manner his own interests. The instrument in question may be unilateral or made by one party only; or it may be inter partes, i. e. made between two or more parties. At common law the rule is, that the right of action upon a deed inter partes is restricted to those only who are parties to it (*l*). This rule, however, has been broken in upon by the stat. 8 & 9 Vict. c. 106, s. 5, which provides, that, under an indenture executed after the 1st of October, 1845, an immediate estate and interest in any tenements or hereditaments, and the benefit of a condition or covenant respecting them, may be taken, although the taker thereof be not named as a party to the said indenture; and the section of the Act just cited further provides, that a deed purporting to be an indenture shall have the effect of an indenture, although not actually indented.

A specialty, as already intimated, is distinguished from a simple contract in writing by certain solemnities attendant on its execution—viz. by *sealing* and *delivery*. It may indeed be laid down as clear law, that, prior to the Statute of Frauds, *signing* was in no case deemed essential to the validity and obligatory force of a deed which had been executed by sealing and delivery (*m*). Even now, the absence of the signature of a party to a deed, the subject matter of which comes within the operation of that statute, would

(*k*) 2 Com. 295.

(*l*) *Anderson* v. *Martindale*, 1 East, 497; *Lord Southampton* v. *Brown*, 6 B. & C. 718; per Lord *Ellenborough*, C. J., *Storer* v. *Gordon*, 3 M. & Selw. 322.

(*m*) Co. Litt. 35. b.; Shepp Touch. 56.

seem to be immaterial (*n*), for the object of that enactment was "to prevent matters of importance from resting on the frail testimony of memory alone." It was not intended to apply to instruments already authenticated by a ceremony of a higher nature than a signature or a mark (*o*).

Delivery is essential to the due execution of a deed; so that if executed after the day on which it purports to bear date, it takes effect from the day of delivery and not from the day of the date, according to the maxim *traditio loqui facit chartam* (*p*). "A deed," says *Bayley*, J. (*q*), "has no operation until delivery."

Although the usual practice in delivering a deed is to place the finger upon the seal or wafer (which has, in general, been previously affixed to the instrument), and to repeat the formula "I deliver this as my act and deed," yet it is clear, on the one hand, that delivery without words is sufficient (*r*), and, on the other, that a deed may be delivered by words without any act of delivery (*s*).

If, moreover, when a deed has been formally sealed and delivered, with apt words of delivery, it is retained by the party executing it, such retention will not per se affect the operation of the deed (*t*). And it is also clear, that delivery to a third person for the use of the party in whose favour the deed is made, provided the grantor parts with all control over the instrument, will make the deed effectual from

(*n*) The signature of a party may, however, be required by the express provisions of the power or authority under which a deed is executed: 2 Bla. Com., 21st ed., 305, n. (18).

(*o*) Per *Rolfe*, B., *Cherry* v. *Heming*, 4 Exch. 636–7; see Williams' Real Prop., 3rd ed., pp. 126–7.

(*p*) *Steele* v. *Mart*, 4 B. & C. 272; *Clayton's case*, 5 Rep. 1.

(*q*) *Styles* v. *Wardle*, 4 B. & C. 911.

(*r*) Co. Litt. 36. a.

(*s*) Co. Litt. 36. a.; Shepp. Touch. 58.

(*t*) *Doe* d. *Garnons* v. *Knight*, 5 B. & C. 671.

the instant of such delivery; for the law will presume, if nothing appear to the contrary, that a man will accept what is for his benefit (*u*).

A deed may, however, be delivered as an *escrow*, i. e. it may be delivered to a stranger to be kept by him until certain specified conditions be performed, and then to be delivered over to the grantee (*x*). If, in point of fact, the deed is delivered not to take effect as a deed until some condition is performed, it will operate as an escrow, not withstanding the delivery is in form absolute (*y*).

The legal consequences which flow from the execution (*z*) of a written contract by sealing and delivery are most important. Directly that an instrument containing a contract is sealed by the parties thereto, it becomes a deed (*a*), and as such is clothed with the following properties, which do not attach to a simple contract in writing. It works a merger; it operates by way of estoppel; it requires no consideration to support it; it will in some cases bind the heir of the covenantor or obligor; it can only be discharged by an instrument under seal or by the judgment of a Court of competent authority.

The limits necessarily prescribed for this treatise will not of course allow of any attempt on my part to consider the forms of deeds, or the various modes which have been devised for effecting, through their intervention, objects which are in kind almost infinitely diversified. The reader will bear in mind, however, that in every valid deed there must

(*u*) *Doe* d. *Garnons* v. *Knight*, supra; 3 Rep. 26 b.

(*x*) 4 Kent Com., 7th ed., 499; Co. Litt. 36. a.

(*y*) Per *Pollock*, C. B., *Christie* v. *Winnington*, 8 Exch. 290; *Murray* v. *Earl of Stair*, 2 B. & C. 81; 2 Bla. Com., 21st ed., 307, n. (20).

(*z*) There cannot be a *partial* execution of a deed: see *Wilkinson* v. *The Anglo-Californian Gold Mining C.*, 21 L J., Q. B., 327.

(*a*) Per *Coleridge*, J., *Hall* v. *Bainbridge*, 12 Q. B. 707. See *Davidson* v. *Cooper*, 13 M. & W. 343, 353.

be parties able to contract, and also a thing or subject matter to be contracted for, all which must be specified and set forth with some sufficient degree of certainty and precision; for instance, in every grant there must be a grantor, a grantee, and a thing granted; in every lease, a lessor, a lessee, and a thing demised (*b*).

Covenant—what.

The agreements of parties under seal usually contain, however, in addition to the above simple elements, stipulations and conventions, usually called covenants (*c*), more or less elaborately worded, whereby either party vouches for the truth of certain facts, or binds himself to do or to refrain from doing certain things. Thus, the grantor of an estate may covenant that he hath a right to convey, or that the grantee shall quietly enjoy the land; a lessee may covenant to pay his rent or to keep the premises in repair (*d*).

No particular form of words is necessary to create a covenant; any words are sufficient for that purpose "which shew an intention to be bound by the deed to do or omit that which is the subject of the covenant; any such words are sufficient, and some such words are necessary to make a covenant" (*e*). It will readily be supposed, that, where a deed has been informally prepared, much difficulty may be felt in determining the intention of the parties to it, and in in-

(*b*) 2 Bla. Com. 296.

(*c*) A covenant may be defined to be "an agreement between two or more persons by an instrument in writing sealed and delivered, whereby some of the parties engage, or one of them engages with the other or others of them, that some act hath or hath not already been done; or for the performance or nonperformance of some specified duty:" Platt on Cov. p. 3.

(*d*) 2 Bla. Com. 304. A man may covenant that a thing is already done, or that it shall be done. In the one case the covenant is executed; in the other, executory: Shepp. Touch. 162.

(*e*) Judgment, *Rashleigh* v. *The South Eastern R. C.*, 10 C. B. 632; *Wood* v. *The Copper Miners' Co.*, 7 C. B. 906; per *Parke*, B., *Rigby* v. *The Great Western R. C.*, 14 M. & W. 815; Platt on Cov. pp. 27 et seq.

terpreting their covenants. Upon this subject it will be sufficient here to say, that, although where the words of a covenant are clear and free from doubt, effect must be given to them; yet, if "a covenant may have two meanings, each of which is equally probable, in each of which the words are capable of expressing the same thing, and the question is, in which of the two senses it is to be understood, that meaning which it is most probable the parties contemplated is the one that is to be adopted" (*f*).

"Generally speaking," remarks the learned Judge, whose words I have just cited, "the construction of a written contract is for the Court; but when it is shewn by extrinsic evidence that the terms of the contract are ambiguous, evidence is admissible to explain the ambiguity, and to shew what the parties really meant. That is one of Lord *Bacon's* maxims (*g*). Where there is an election between two meanings it is properly a question for the jury. So, if a man devise land to his 'cousin John,' and it appears that he has two cousins named John, extrinsic evidence is admissible to shew to which of them he meant the land to go" (*h*).

Such being in brief the nature and mode of interpreting a covenant, I may observe, that, when covenants are viewed in relation to each other, they will be found to be divisible into three classes. 1. Such as are called mutual or *independent* covenants,—that is to say, where either party may recover damages from the other for the injury he may have sustained by a breach of the covenants in his favour, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff. 2. There are

Covenants—independent.

(*f*) Per *Maule*, J., *West London R. C* v. *London and N. W. R. C.*, 11 C. B 324, *Bland* v. *Crowley*, 6 Exch. 522, 529.

(*g*) Bac. Max. reg. 23

(*h*) *Smith* v. *Thompson*, 8 C. B 59.

also covenants which are conditions and *dependent*,—that is, in which the performance of one covenant depends on the prior performance of another; so that till the prior condition be performed, the other party is not liable to an action on his covenant. 3 There is a third sort of covenants, sometimes called *concurrent*, which are *mutual conditions to be performed at the same time;* and in these if one party is ready and offers to perform his part, and the other neglects or refuses to perform his, he who is ready and offers thus legally fulfils his engagement, and may, therefore, maintain an action against the other party for his default, even though neither be obliged to do the first act (*i*).

—dependent;

—concurrent.

Covenants, besides admitting of the classification above given, are also designated, regard being had to their nature and to the subject-matter which they may concern, as *real*, *personal*, or *collateral*. A covenant *real* being such as is annexed to an estate and to be performed on it; a covenant *personal* being one whereof some person in particular shall have the benefit, or whereby he shall be charged, or one which is to be performed personally by the covenantor alone (*j*). The term *collateral*, when applied to a covenant,

Covenants — real, personal, and collateral.

(*i*) Per Lord *Mansfield*, *Kingston* v. *Preston*, cited *Jones* v. *Barkley*, 2 Dougl. 689. Respecting the above classes of covenants the reader is referred to *Pordage* v. *Cole*, 1 Saunds. 319; 1 Wms. Saunds. 320 a, (4); Platt on Cov. p. 70; Woodf. L. & T., 6th ed., 83; *Friar* v. *Grey*, 15 Q. B. 891, and 5 Exch. 584; *Ellen* v. *Topp*, 6 Exch. 424; *Sibthorp* v. *Brunel*, 3 Exch. 826.

In *Pordage* v. *Cole*, supra, it was "*agreed*" between A. (the plaintiff) and B. (the defendant) by instrument under seal, that B. should pay to A., before a day named, a sum of money for his lands, &c. (whereof 5*s*. was actually paid as earnest). It was, in the first place, held, that, by this agreement, a covenant on the part of A. was raised to convey the land; and, secondly, that the covenants to pay the money and to convey were *independent* of each other, so that A. might sue for the residue of his purchase money before any conveyance by him of the land.

(*j*) Woodf. L. & T., 6th ed., p. 80; Platt on Cov., Pt. 1, Chap. 2, s. 1.

is commonly used in contradistinction to the term *real*, as above defined. A covenant is said to be collateral, when the thing to be done in pursuance of it is "merely collateral to the land, and doth not touch or concern the thing demised in any sort" (*k*), or not so immediately as to pass with it to an assignee. Such a covenant is also said to be *in gross*.

If, for instance, a lessee covenant to pay rent or to repair, or if a lessor grant to his lessee the liberty of taking wood from off the demised premises to burn within his house or to repair his fences during the term, the covenant is 'real;' it passes with the land to its assignee, so that he who takes the one becomes immediately subject to the other (*l*). On the other hand, a covenant to pay a sum of money, or a covenant by a lessee not to hire certain persons to work in a mill about to be erected on the land demised (*m*), would be 'personal' to the covenantor, and would not bind his assignee. In this latter case the covenant might be said to be altogether 'collateral' to the land.

To *Spencer's case* (*n*), which is the leading authority to shew what covenants do or do not 'run with land,' i. e. pass with it from assignee to assignee, I must refer the reader for information upon that important subject. It may, however, be well to present shortly the principal rules there laid down as stated by *Wilmot*, C. J., in *Bally* v. *Wells* (*o*). "Covenants in leases," says that learned Judge, "extending to a thing 'in esse,' parcel of the demise, run with the land and bind the assignee, though he be not

(*k*) *Spencer's case*, 5 Rep. 16, 2nd Resol.

(*l*) Id. ibid.

(*m*) *Mayor of Congleton* v. *Pattison*, 10 East, 130.

(*n*) 5 Rep. 16; 1 Smith L. C. 22, with the note appended thereto.

(*o*) Wilmot's Notes, 344, cited per *Holroyd*, J., *Vernon* v. *Smith*, 5 B. & Ald. 7, and in 2 Wms. Saund. 304, n. (12).

named—as to repair, &c. And if they relate to a thing not 'in esse,' but yet the thing to be done is upon the land demised, as to build a new house or wall, the assignees, if named, are bound by the covenants; but if they in no manner touch or concern the thing demised, as to build a house on other land, or to pay a collateral sum to the lessor, the assignee, though named, is not bound by such covenants; or if the lease is of sheep or other personal goods, the assignee, though named, is not bound by any covenant concerning them. The reasons why the assignees, though named, are not bound in the two last cases are not the same. In the first case it is because the thing covenanted to be done has not the least reference to the thing demised; it is a substantive, independent agreement, not quodam modo, but nullo modo, annexed or appurtenant to the thing leased. In the case of the mere personalty, the covenant doth concern and touch the thing demised, for it is to restore it or the value at the end of the term; but it doth not bind the assignee, because there is no privity, as there is in the case of a realty between the lessor and lessee and his assigns in respect of the reversion."

Covenants—express and implied.

Again, a covenant may be *express* or *implied*. "There are," says Sir *E. Coke*(*p*), "two kinds of covenants, viz. a covenant in deed, and a covenant in law." A 'covenant in law,' properly speaking, being "an agreement which the law infers or implies from the use of certain words having a known legal operation;" for instance, if a man by deed demise land for years, an action of covenant will lie at suit of the tenant after ouster upon the word "demise," which imports or makes a covenant in law for quiet enjoyment. Here the word in question, after having had its primary operation

(*p*) Co. Litt. 139. b.

in creating the estate, derives from the law a secondary force, by being held to imply an agreement on the part of the grantor to protect and preserve the estate so by that word already created (*q*).

Having now explained sufficiently for my present purpose the office of a covenant, having also pointed out the leading classes into which covenants are divisible, and shewn how these classes are distinguishable from each other, I propose to exhibit very briefly the nature and structure of a bond, and then to pass on to a notice of the peculiar properties which may be considered as characteristic of instruments under seal generally.

Bond—what.

A bond may be defined to be "an instrument under seal, whereby one person becomes bound to another for the payment of a sum of money, or for the performance of any other act or thing. The person thus bound is called the obligor, and he to whom the bond is given the obligee. And this obligation may be either by or to one or several persons" (*r*).

If a bond be merely for the payment of money, or for the performance of some particular act without any condition in or annexed to it, the bond is said to be *single;* but there is in general a condition added to the bond in the nature of a defeasance, stipulating that if the obligor duly performs the act specified, the obligation shall be void, otherwise that it shall remain in full force. In case this condition is not performed the bond becomes forfeited (*s*), so that the entire penalty named therein was formerly recoverable at law Now, however, by virtue of the stat. 4 & 5 Ann. c. 16, ss. 12 and

(*q*) Judgment, *Williams* v. *Burrell*, 1 C. B. 429, 430; Platt on Covenants, Pt. 1, Ch. 2, s. 3.

(*r*) Hurlstone on Bonds, p. 1.

(*s*) 2 Bla. Com. 340. The condition of a bond being for the benefit of the obligor must, in general, be strictly performed: Hurlstone on Bonds, Ch. 2, s. 3.

13, in the case of a bond conditioned for the payment of money, the payment of the principal sum due, with interest and costs, even though the bond be forfeited, and a suit has been commenced thereon, will be a full satisfaction and discharge (*t*). Also, by the stat. 8 & 9 Will. 3, c. 11, s. 8, damages and costs of suit only are recoverable in an action upon a bond executed by way of security for the performance of covenants contained in any deed or indenture (*u*).

Doctrine of merger as applicable to deeds generally.

Of specific properties inherent in a deed, the first to be noticed is that of *merger*. A deed, being of a higher nature than a simple contract (*v*), will, if given or entered into in relation to the same subject matter, altogether merge or swallow up the latter, and extinguish any right of action which might have been founded upon it. For instance, by the acceptance of a bond for a simple contract debt, the debt (according to the accustomed phraseology), will merge in the higher security (*x*); and if a covenant be entered into to pay a sum of money actually due, the remedy thenceforth must be upon the covenant, and not upon the original cause of action (*y*).

In *Middleditch* v. *Ellis* (*z*), it is observed, that "The general principle is clear, that, where a debt is secured by a bond, covenant, or other specialty, there the obligation by sim-

(*t*) 2 Bla. Com. 341.

(*u*) As to the effect and operation of this enactment, see Hurlstone on Bonds, pp. 129, 131.

(*v*) A debt due for *rent* is not, however, merged by giving a bond; because rent is a specialty debt: per *Cresswell*, J., 10 C. B. 574; Woodf. L. & T., 6th ed., pp. 310, 311. Nor can one bond merge another bond: 6 Rep. 45 b.

(*x*) Bac. Abr. Oblig. (D); *Higgins's case*, 6 Rep. 44 b; per Lord *Ellenborough*, C. J., *Drake* v. *Mitchell*, 3 East, 251. A specialty does not, however, strictly speaking, "merge or extinguish the *debt;* but it merges the *remedy* by way of proceeding upon the simple contract:" per *Maule*, J., 10 C. B. 573.

(*y*) Post, p. 286.

(*z*) 2 Exch. 623.

ple contract is gone: the lesser security is merged in the greater;" and the principle thus stated was forcibly applied by the Court to the facts before them in the case just mentioned. There the plaintiff was mortgagee under a mortgage from the defendant, with a power of sale; the mortgage deed containing the ordinary covenant by the defendant to pay the principal sum secured, with interest. The mortgaged property was sold by the plaintiff under the power thus given, but did not produce sufficient to discharge the debt due to him; and a meeting afterwards took place between the plaintiff and defendant, at which an account was stated between them charging the defendant with the full amount of principal and interest, and giving him credit for the net proceeds of the sale. It was held, upon these facts, that an action of debt upon the account stated would not lie, the balance found to be due thereby from the defendant to the plaintiff having in truth arisen upon the deed, and not upon the subsequent settlement (*a*).

In order to trace out the full operation of the doctrine of merger, let us suppose, that A., being indebted to B. in the sum of 100*l.* for goods sold and delivered, accepts a bill of exchange drawn upon him by B. at a date certain for that amount, the effect of this transaction will be to suspend or postpone, until the bill falls due, B.'s right of action against A. in respect of the goods sold (*b*). Let us next suppose, that the bill thus given is dishonoured at maturity, and that B., in lieu of then proceeding against A., as he would be entitled to do, in respect either of his original demand or upon the bill, agrees to take A.'s bond in the penal sum of 200*l.*, conditioned for the payment to B. of 100*l.* and interest thereupon at some future day. Now, if default be made in

(*a*) See *Petch* v. *Lyon*, 9 Q. B. 147. (*b*) Ante, p. 112.

the payment of the amount thus secured, the only remedy at law available to B. against A will be by action upon the bond, his right of suit, whether in respect of his original claim or of the bill, having become merged in and extinguished by the instrument under seal. To pursue this inquiry a step further, let us suppose that B. recovers judgment in an action of debt upon the bond against A., the sole mode of obtaining satisfaction from his debtor thenceforth available to B. will be upon the judgment in which the bond debt will itself have become merged, in accordance with a principle already explained, and which is expressed by the legal phrase *transit in rem judicatam* (c).

But although the doctrine of merger in connection with specialties is in theory thus simple, difficulty occurs not unfrequently in applying it, for the rule in question is subject to some qualifications, which must now accordingly be noticed.

"In general," says *Bayley*, J., in *Twopenny* v. *Young* (d), "where a simple contract security for a debt is given, it is extinguished by a specialty security, *if the remedy given by the latter is coextensive with that which the creditor had upon the former.*" Observing the qualification thus introduced into the rule, we may conclude that a bond given for a limited sum would not operate to merge a debt of *indefinite* amount (e), and that the contract under seal of a surety will not by operation of law extinguish the simple contract debt of the principal (f). So if one of two makers of a joint and several promissory note executes to the holder a mortgage to secure the amount, and covenants therein to pay it, the other maker is not thus discharged; the remedy given by

(c) Ante, p. 270.

(d) 3 B. & Cr. 208.

(e) *Norfolk R. C.* v. *M'Namara*, 3 Exch. 628, 631.

(f) *White* v. *Cuyler*, 6 T. R. 176; *Holmes* v. *Bell*, 3 M. & Gr. 213.

the specialty being confined to one of the debtors only, and, therefore, not co-extensive with that which the creditor had upon the note (*g*).

Again, where it clearly appears on the face of an instrument under seal that the intention of the parties to it was, that the original debt secured thereby should continue to exist, or that the security (if any) previously given should remain in force, some doubt may upon decided cases reasonably be felt, whether the deed will or will not necessarily have the effect of extinguishing the prior security or debt. If, indeed, a bond or covenant be entered into simpliciter for an existing debt, a plea stating this fact will be good to an action founded on the simple contract, although it do not allege that the instrument was given 'in satisfaction of' the debt (*h*)—the reason being, that by force of law the simple contract merges in the higher security. "Primâ facie," says *Jervis*, C. J., in *Price* v. *Moulton* (*i*), "the general rule is, that, where a security of a higher nature is taken for the same debt, it operates a merger of the lower security; a party cannot sue for money had and received where he has got a security for the same debt, which gives him a remedy of a higher degree."

The remarks just made seem also applicable where the obligation under seal is expressly stated to be given as a 'security for payment of' a debt. In either of the foregoing cases the policy of our law is, that there shall not be two subsisting remedies, one upon the deed, and another upon the simple contract by the same person against the same person for the same demand (*k*).

(*g*) *Ansell* v. *Baker*, 15 Q. B. 20; *Solly* v. *Forbes*, 2 Brod. & B. 38.

(*h*) Per *Parke*, B., *Norfolk R. C.* v. *M'Namara*, 3 Exch. 631-2.

(*i*) 10 C. B. 561, 572.

(*k*) Per *Maule*, J., 10 C. B. 574. See *Marker* v. *Kenrick*, 13 C. B. 188, 199.

It seems, then, quite established that the intention of parties *not expressed* upon the face of a deed can in no degree affect its legal operation in regard to merger. It may perhaps also be inferred from the remarks of the Court of Common Pleas, in *Price* v. *Moulton* (*l*), that the expression even of such an intention of the parties appearing in the deed could not, *per se*, alter or qualify its strict legal operation.

Estoppel by deed.

Inasmuch as a deed is a "solemn and authentic act," "a man," says Sir W. Blackstone (*m*), "shall always be *estopped* by his own deed, or not permitted to aver or prove anything in contradiction to what he has once so solemnly and deliberately avowed." "The principle," says *Taunton*, J. (*n*), "is, that where a man has entered into a solemn engagement by deed under his hand and seal as to certain facts, he shall not be permitted to deny it in pleading.

As illustrating the operation of the rule just stated may be mentioned the case of *Horton* v. *The Westminster Improvement Commissioners* (*o*). There the plaintiff sued upon a bond, the condition of which recited, that, by virtue of certain Acts of Parliament, the defendants were authorised to borrow money for the purposes thereof, &c.; and that they, in pursuance of the Acts, had borrowed of one P. a certain sum of money "for enabling them to carry the purposes of the said Acts into execution." To the declaration, which set out the above condition, the defendants

(*l*) 10 C. B. 561, with which, however, compare the observations of *Bayley*, J., and *Holroyd*, J., in *Twopenny* v. *Young*, 3 B. & C. 208.

(*m*) 2 Com. 295.

(*n*) *Bowman* v. *Taylor*, 2 Ad. & E. 291. "The principle of estoppel is, that, whether there be a cause of action or not, the party *cannot allege it*:" per *Coleridge*, J., *Parkes* v. *Smith*, 15 Q. B. 312.

(*o*) 7 Exch. 780, and cases there cited; *Bowman* v. *Taylor*, supra; *Hills* v. *Laming*, 9 Exch. 256. The subject of estoppel by deed is fully discussed in the note to the *Duchess of Kingston's case*, 1 Smith L. C. 456—458.

pleaded, inter alia, that 'they did not, in pursuance of the said Acts of Parliament, borrow of P. the said sum, or any part thereof, for enabling them to carry the purposes of the Acts or any or either of them into execution, nor was the same lent or advanced by P. or any other person for those purposes.' This plea was, on demurrer, held bad, on the ground that the defendants were estopped by their deed from setting up the defence disclosed in it.

Precisely to a similar effect it was decided in *Hill* v. *The Proprietors of the Manchester Water-works* (p), that the obligor of a bond reciting a certain consideration is estopped from pleading that the consideration was in fact different from that recited.

Both the foregoing cases, besides exemplifying the doctrine of estoppel by deed, may usefully be consulted with reference to this important qualification of it—that a deed is not in all cases conclusive by way of estoppel, but is impeachable for fraud or illegality.

Collins v. *Blantern.*

The leading authority, however, in support of the qualification just specified of the doctrine of estoppel by deed is the case of *Collins* v. *Blantern* (q), which established that illegality may be pleaded as a defence to an action on a contract under seal. There, to a declaration in debt on a joint and several bond for 700*l.* the defendant pleaded the following facts:—That, before and at the time of making the bond in question, and the promissory note presently mentioned, his (the defendant's) co-obligors, together with three other parties, stood indicted at the suit of one John Rudge for wilful and corrupt perjury, and had severally pleaded not guilty to the charge; that, when the trial was about to come on, it was agreed between John Rudge (the prosecutor), the

(p) 2 B. & Ad. 544. (q) 2 Wils. 341; 1 Smith L. C. 154.

plaintiff, and the parties indicted, that the plaintiff should give to the prosecutor his note for 350*l.* as a consideration for his not appearing to give evidence at the trial; it being further agreed that the bond sued upon should be executed by the defendant Blantern and his co-obligors to the plaintiff, to indemnify him in respect of the note on which he had, as just mentioned, become liable to the prosecutor.

Upon general demurrer to the above plea, it seems to have been mainly contended on behalf of the plaintiff, that, the bond appearing on the face of it to be good and lawful, no averment could be admitted to shew that it had, in fact, been given upon an illegal consideration.

In the judgment delivered by *Wilmot*, C. J., in the above celebrated case, three points solemnly discussed demand our attention:—1. Whether, on the facts alleged, the consideration for giving the bond was illegal. 2. Whether a bond given for an illegal consideration is void at common law *ab initio*. 3. Whether, supposing the bond to be void, the facts disclosed in the plea to shew that it was so could by law be averred and specially pleaded.

With regard to the 1st point above specified, the Court remarked, "This is an agreement to stifle a prosecution for wilful and corrupt perjury, a crime most detrimental to the commonwealth; for it is the duty of every man to prosecute, appear against, and bring offenders of this sort to justice" (*r*). . . . . "The promissory note was certainly void: what right, then, hath the plaintiff to recover upon this bond, which was given to indemnify him from a note that was void? They are both bad, the consideration for giving them being wicked and unlawful."

(*r*) See *Keir* v. *Leeman*, 6 Q. B. 308; *S. C.* (in error), 9 Q. B. 371; *Reg.* v. *Hardey*, 14 Q. B. 529; *Reg.* v. *Blakemore*, Id. 544; *Masters* v. *Ibberson*, 8 C. B. 100.

As to the 2nd point, the Court held the bond to be void ab initio, according to the principle laid down in the Institutes of Justinian(*s*), *Quod turpi ex causâ promissum est, veluti si quis homicidium vel sacrilegium se facturum promittat, non valet.*

"This," the Court proceeded to observe with reference to the case before them, "is a contract to tempt a man to transgress the law, to do that which is injurious to the community; it is void by the common law, and the reason why the common law says such contracts are void is for the public good. You shall not stipulate for iniquity. All writers upon our law agree in this,—no polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a Court to fetch it back again."

As to the 3rd point, viz. whether the matter relied upon as a defence could be pleaded? the Court remarked—"It is now objected as a maxim, that the law will not endure a fact in pais dehors a specialty to be averred against it, and that a deed cannot be defeated by anything less than a deed, and a record by a record(*t*); and that, if there be no consideration for a bond, it is a gift. I answer that the present condition is for the payment of a sum of money, but that payment to be made was grounded upon a vicious consideration, which is not inconsistent with the condition of the bond, but strikes at the contract itself in such a manner as shews that in truth *the bond never had any legal entity;* and if it never had any being at all, then the rule or maxim, that a deed must be defeated by a deed of equal strength, does not apply

(*s*) I. 3. 20. 24.

(*t*) An obligation by record may, however, be released by deed: per *Parke*, B., *Barker* v. *St. Quintin*, 12 M. & W. 453. See the authorities cited Leg. Max. 2nd ed., p. 682, n. (*c*).

to this case. The law will legitimate the shewing it void ab initio, and this can only be done by pleading" (*u*).

It would be wholly unnecessary to cite many cases at length (*x*), with a view to fortifying the conclusions arrived at by arguments so convincing as those above abstracted; but I cannot refrain from directing attention to three additional authorities in regard to the particular qualification of the rule as to estoppel by deed now under consideration.

In *The Gas Light and Coke Company* v. *Turner* (*y*), a plea to an action of covenant for rent due under a lease, alleging that the premises in question were demised to the defendant for an unlawful purpose, was held to be good. "The objection that has been urged on the part of the defendant," said *Tindal*, C. J., delivering the judgment of the Court in that case, "is, that this is an action founded upon a contract, and that a Court of law will not lend its aid to enforce the performance of a contract between parties which appears upon the face of the record to have been entered into by both the contracting parties for the express purpose of carrying into effect that which is prohibited by the law of the land. And we think, both from authority and reason, this objection must be allowed to prevail. That no legal distinction can be supported to the application of this objection to parol contracts and to contracts under seal appears the necessary inference from the cases of *Collins* v. *Blantern* (*z*) and *Paxton* v. *Popham* (*a*), in both which cases the

(*u*) As to the mode of raising the defence of fraud or illegality in answer to an action on a deed, see further post, p. 294.

(*x*) See *Duvergier* v. *Fellowes*, 1 Cl. & F. 39; *Simpson* v. *Lord Howden*, 9 Cl. & F. 61; *Jones* v. *Waite*, Id. 101; *Evans* v *Edmonds*, 13 C. B. 777.

(*y*) 5 Bing. N. C 666.

(*z*) Ante, p. 288.

(*a*) 9 East, 408.

principle above laid down was acted upon by the Court, and in each of which the action was upon a bond; and it would, indeed, be inconsistent with reason and principle to hold, that, by the mere ceremony of putting a seal to an instrument, that is, by the voluntary act of the parties themselves, a contract which was void in itself on the ground of its being in violation of the law of the land, should be deemed valid, and an action be maintainable thereon in a Court of justice."

In *Higgins* v. *Pitt* (b) the plaintiff sued for the breach of a covenant contained in a composition deed, whereby the defendant and others had covenanted to indemnify the plaintiff from all loss, &c. in respect of certain acceptances of his outstanding at the execution of the said deed. To this declaration the defendant pleaded, that, before executing the said indenture, an agreement was entered into between the defendant, J. M. (his partner), and the plaintiff, under which the defendant and J. M. were to receive from the plaintiff more than his other creditors. The Court held this plea to be good, on the ground that every such secret bargain is a fraud on the creditors, and void when it is made; so that it cannot be enforced even against a particeps criminis.

In *Mallalieu* v. *Hodgson* (c) the effect of fraud in invalidating a deed was much discussed. There, to a count for goods sold and delivered, money lent &c., a release was pleaded. To this plea the plaintiff replied, that the release was had and obtained from him by the fraud, covin, and misrepresentation of the defendants and others in collusion with them; to which the defendants rejoined a denial that the release was obtained by fraud, &c., as alleged. It appeared by the evidence in this case that the defendants, being in-

(b) 4 Exch. 312. (c) 16 Q. B. 689, and cases cited Id. 706, 707.

debted to several persons, and, amongst others, to the plaintiff, proposed a composition, which was agreed to by the majority of the creditors, but was refused by the plaintiff, unless upon the condition that he was paid more than the other creditors upon one part of his debt, and, as regarded the other part, was paid in full. Upon receiving notes for the amount agreed upon, and being assured by the defendants that no other creditor than himself was preferred, he signed a release for his entire debt. The assurance of the defendants, however, that no other creditor was preferred was untrue. Under the circumstances here detailed a twofold fraud was made manifest:—1st, the fraud upon the creditors, wherein both the plaintiff and the defendants participated; 2ndly, the misrepresentation put forth by the defendants to the plaintiff prior to his execution of the release. The question to be decided accordingly was, whether, on the above facts and pleadings, the plaintiff could successfully insist on the fraud practised towards him by the defendants, or whether his connexion with the original fraud upon the creditors, whence it sprung, and with which it was connected, did not effectually preclude him from so doing. This latter view of the question was taken by the majority of the Court. "The whole consideration for his (plaintiff's) release," observed *Coleridge*, J., "is the fraudulent preference promised to himself, and the withholding any such preference from other creditors: he (the plaintiff) cannot allege the former as a fraud on himself to vitiate the release, for he is *particeps fraudis;* and the latter is so entirely mixed up with it, deriving all its materiality from it, that the same disability seems to me to exist as to it."

Since the case of *Collins* v. *Blantern* it has been held as settled law, that a deed is impeachable on the ground of il-

legality or of fraud, which, as already stated (*d*), "vitiates everything," and to which the reasoning of Lord Chief Justice *Wilmot*, already cited, applies quite as forcibly as to illegality; either of these defences being properly raised by a special plea, as, indeed, is now expressly required by the Pleading Rules, Hil. T. 1853 (reg. 8).

But although the general rule is free from doubt, that fraud or illegality may, if aptly pleaded, afford a good defence to an action upon a contract under seal, it would be erroneous to affirm that a deed tainted with illegality or fraud in its inception is necessarily void, and without "any legal entity" (*e*), as between all parties and for all purposes.

It could not, indeed, be contended, after perusing the cases below cited (*f*), that a party to a contract under seal is *in general* estopped from alleging his own fraud, or his own participation in an illegal transaction by way of answer to an action upon the deed. But nevertheless a conveyance made in contravention of some particular statute may be invalidated thereby, quoad the object contemplated by the parties, and yet may remain good and effectual as against the grantor. Thus a conveyance made for the mere purpose of conferring a vote has been held void only to the extent of preventing the right of voting from being acquired, but valid between the parties to pass an interest in the land (*g*). And an assignment of goods in fraud of creditors may be binding and unimpeachable as between the assignor and as-

(*d*) Ante, p. 272.

(*e*) Ante, p. 290.

(*f*) *Collins* v. *Blantern*, ante, p. 288; *Higgins* v. *Pitt*, ante, p. 292; (with which, however, compare *Mallalieu* v. *Hodgson*, ante, p. 292; and the remarks per Cur. in *Doe* d. *Roberts* v. *Roberts*, 2 B. & Ald. 369, 370); *Fisher* v. *Bridges*, 2 E. & B. 118; *Evans* v. *Edmonds*, 13 C. B. 777; *Wontner* v. *Shairp*, 4 C. B. 404; *Watson* v. *Earl of Charlemont*, 12 Q. B. 856, 864.

(*g*) *Phillpotts* v. *Phillpotts*, 10 C. B. 85, and cases cited per *Maule*, J., Id. 95.

signee(*h*). In these, and other cases of a like kind, the legal maxim would seem forcibly to apply,—*quod fieri non debet factum valet.* Every transaction is moreover, according to an universal rule, presumed to be valid; so that the proof of fraud lies upon the party by whom it is imputed(*i*).

The mode of raising the defence of estoppel by deed is by pleading it, *if there be an opportunity*(*j*); by demurrer, where the estoppel appears on the face of the record(*k*); or by evidence in other cases,—as where the proceedings take place in a County Court(*l*).

"The doctrine of estoppel," says Lord *Denman*, C. J.(*m*), "has been guarded with great strictness; not because the party enforcing it necessarily wishes to exclude the truth, for it is rather to be supposed that that is true which the opposite party has already recited under his hand and seal, but because the estoppel *may* exclude the truth." It is, therefore, a recognised rule that estoppels must be certain(*n*), and that a plea by way of estoppel must be certain *to every intent*,—which seems to amount to this,—that it must meet and remove by anticipation every possible answer of the adversary(*o*).

It may be well to add, that, where the matter relied upon as an estoppel occurs in the recital of a deed, the Court will look narrowly at the words used; for, although when a recital is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an

(*h*) *Bessey* v. *Windham*, 6 Q. B. 166, recognising *Doe* d. *Roberts* v. *Roberts*, 2 B. & Ald. 367.

(*i*) Per *Parke*, B., 8 Exch. 400.

(*j*) 1 Smith L. C. 457; per Lord *Campbell*, C. J., *Reg.* v. *Inhabs. of Haughton*, 1 E. & B. 512.

(*k*) 1 Smith L. C. 457.

(*l*) *Shaw* v. *Beck*, 8 Exch. 392; *Sargent* v. *Wedlake*, 11 C. B. 732.

(*m*) 2 Ad. & E. 289.

(*n*) *Kepp* v. *Wiggett*, 10 C. B. 35.

(*o*) Steph. Pl., 5th ed., 390.

estoppel upon all; yet when it is intended to be the statement of one party only, the estoppel is confined to that party; the intention being ascertained from construing the instrument(*p*).

Relief in equity against fraudulent deed.

Although, as shewn in the preceding pages, fraud may be set up as a good defence at law to an action, even upon so solemnly authenticated an instrument as a deed, and although the stat. 13 Eliz. c. 5 has rendered utterly void as against creditors fraudulent bonds, grants, or conveyances, &c., it is nevertheless to Courts of equity that recourse is usually had where the execution of a deed has been obtained by collusion or through misrepresentation or fraud. Courts of equity, indeed, are much better able to deal with such cases than Courts of law, because their decrees can so be moulded as to do complete justice between litigating parties; whereas the verdict of a jury (which, however, is often made ancillary to the settlement of a case in equity), must be confined to saying yea or nay with regard to each particular issue submitted to their decision. Courts of equity, moreover, as remarked by Dr. Story(*q*), "do not restrict themselves by the same rigid rules as Courts of law do in the investigation of fraud, and in the evidence and proofs required to establish it." In practice, therefore, where execution of a deed, ex. gr. a bond, has been obtained by a party under circumstances savouring of fraud, it may often be advisable to file a bill in equity with a view to having the deed declared void and for its delivery up and cancellation, rather than to await proceedings upon it in a Court of

(*p*) Judgment, *Stronghill* v. *Buck*, 14 Q. B. 787; *Young* v. *Raincock*, 7 C. B. 310; *Wiles* v. *Woodward*, 5 Exch. 557; *Carpenter* v. *Buller*, 8 M. & W. 212; *Foster* v. *Mentor Ass. Co.* 3 E. & B. 48. An estoppel by deed, in like manner as an estoppel by record, extends to persons claiming under the party who is estopped: 1 Smith L. C. pp. 457-8.

(*q*) Com. Eq. Jurisp., 6th ed., s. 190.

law. Where, moreover, proceedings have been there actually commenced upon a deed obtained by fraud, it will very possibly be deemed expedient to apply to equity for an injunction to restrain the action rather than to go to trial before a jury upon an issue as to fraud (*r*).

Consideration not necessary to support deed.

Closely related to the doctrine of estoppel is this proposition—that 'a deed requires no consideration to support it.' Where a contract has been duly executed by sealing and delivery—not being a deed of feoffment, nor operating by the Statute of Uses—the solemnity of the instrument dispenses, as between the parties to it (if it be a deed inter partes), or, as between the obligor and obligee (if it be a bond), with the necessity of a consideration. "A man may, therefore," as once observed by Lord *Mansfield* (*s*), "*without consideration*, enter into an express covenant under hand and seal;" and as Blackstone (*t*) tells us, if a man enters into a voluntary bond, "he shall not be allowed to aver the want of a consideration, in order to evade the payment; for every bond, from the solemnity of the instrument, carries with it an internal evidence of a good consideration;" so that Courts of justice will support it, in the absence of fraud, as against the obligor himself, though not, in general, "to the prejudice of creditors or strangers to the contract" (*u*).

A deed, however, as we have already seen (*x*), is impeachable for fraud; and one main ingredient in fraud, or in the

(*r*) As to the grounds on which equity will interpose where the execution of a deed has been obtained by fraud, see Mitf. Pl., 5th ed., p. 150; Story Eq. Jurisp., 6th ed., ss. 695, 700, et seq.; *Cooke* v. *Lamotte*, 21 L. J., Chanc., 371; *Reynell* v. *Sprye*, Id. 633.

(*s*) *Shubrick* v. *Salmond*, 3 Burr. 1639; Judgment, *Morley* v. *Boothby*, 3 Bing. 111, 112.

(*t*) 2 Com. 446; per Lord *Kenyon*, C. J., *Fallowes* v. *Taylor*, 7 T. R. 475, 477; per *Abbott*, C. J., *Irons* v. *Smallpiece*, 2 B. & Ald. 551, 554.

(*u*) 2 Bla. Com. 446.

(*x*) Ante, p. 288.

proof of it, is not unfrequently a want of consideration (*y*). When, moreover, the inquiry is respecting the operation of a deed with reference to the rights of third parties, proof of the absence of consideration *may* be almost conclusive evidence of collusive dealing and of an intention to defraud; and this remark will apply, whether the transaction in question be considered according to the principles of our common law, or with reference to the specific provisions of the statutes 13 Eliz. c. 5 (*z*), (upon which *Twyne's case* (*a*) was decided,) and 27 Eliz. c. 4.

Assuming, however, that there is consideration for a deed, that consideration may be of one or other of two kinds—it may be a *good* or it may be a *valuable* consideration. The distinction here presenting itself is clearly explained by Blackstone (*b*), who says, that "a good consideration is such as that of blood, or of natural love and affection," and "is founded on motives of generosity, prudence, and natural duty;" whereas, a "valuable consideration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant."

Now, the above distinction is in very many cases extremely material, inasmuch as a *voluntary* deed, i. e. a deed made without any consideration at all, or even for a good,

(*y*) Equity, however, will not relieve against a voluntary gift, if there were no undue influence: Judgment, *Huguenin* v. *Baseley*, 14 Ves. 290. The cases in which equity interposes or refuses its aid in favour of volunteers, are collected in the note to *Ellison* v. *Ellison*, 1 White & Tud. L. C. 167.

(*z*) Made perpetual by the stat. 29 Eliz. c. 5.

(*a*) 3 Rep. 80, and 1 Smith. L. C. 1; to which case, with the note appended thereto in Mr. Smith's collection, the reader is referred. See also *Ryall* v. *Rowles*, 1 Ves. sen. 348, 359; *Graham* v. *Furber*, 23 L. J., C. P., 51; *Harland* v. *Binks*, 15 Q. B. 713; *Stone* v. *Van Heythuysen*, 18 Jur. 344; *Doe* d. *Richards* v. *Lewis*, 11 C. B. 1035; *Doe* d. *Newman* v. *Rusham*, 21 L. J., Q. B., 139; *Tarleton* v. *Liddell*, 17 Q. B. 390.

(*b*) 2 Com. p. 297. See also Shepp. Touch. p. 64.

though not for a valuable consideration, is void as against subsequent bonâ fide purchasers for value, and even with notice, by the statute 27 Eliz. c. 4 above mentioned, and also, (when executed by an insolvent party,) as against creditors by virtue of the 13 Eliz. c. 5 (*c*).

But, besides cases of the above class, there are others, connected with the transfer of realty, in which the question as to the existence of a consideration for a deed, or even as to the nature of such consideration, may have an important bearing on the rights and liabilities of parties. In equity, for instance, a feoffment to a stranger without consideration or declaration of a trust, is (irrespectively of statute law) regarded as made for the use of the feoffor, although in this case the legal estate would, prior to the Statute of Uses, have become transferred to and vested in the feoffee. From the absence of consideration for the grant and of any in-

(*c*) In *Gale* v. *Williamson*, 8 M. & W. 405, *Rolfe*, B., speaking of the stat. 13 Eliz. c. 5, observes, "It is a mistake to suppose that the statute makes void, as against creditors, all voluntary deeds. All that it says is, that a practice of making covinous and fraudulent deeds had prevailed, and therefore, that all feoffments, gifts, &c. of any lands or goods and chattels, as against the persons whose actions, debts, &c. by such covinous and fraudulent devices and practices, shall be disturbed, hindered, delayed, or defrauded, shall be void. The Courts, in construing the statute, have held it to include deeds made without consideration, as being *primâ facie* fraudulent, because necessarily tending to delay creditors. But the question in each case is, whether the deed is fraudulent or not; and to rebut the presumption of fraud, the party is surely at liberty to give in evidence all the circumstances of the transaction, not to contradict the consideration stated in the deed, but to take it out of the operation of the statute." "The rule of law," says *Alderson*, B., in the above case, "is, that a deed made merely in consideration of natural love and affection primâ facie imports fraud; that alone shews that it is not *conclusively*, but only *presumptively* fraudulent. It follows, therefore, that evidence may be adduced to shew that no fraud was, in fact, intended."

As to deeds fraudulent within the 12 & 13 Vict. c. 106, s. 67, see Shelf. Bankrupt Act, pp. 74 et seq.: *Graham* v. *Chapman*, 12 C. B. 85; and cases cited, Id. 106 (*a*).

dication of a contrary intention, equity presumed that the feoffment was intended to be for the use of the feoffor, though such presumption might be rebutted by shewing that any the smallest consideration had passed from the feoffee (*d*).

The effect of the Statute of Uses being to transfer the use into possession, its operation in the case supposed, that namely of a feoffment without consideration, would be to give to the feoffor the seisin and possession of the land, notwithstanding livery of seisin had been duly made to the feoffee, the use, (according to the technical phrase) under the circumstances supposed, resulting to the feoffor. If, however, the feoffment be made "to the use" of the feoffee, the case is different, inasmuch as those words would, before the statute, have raised a trust for the benefit of the feoffee, and now, by its operation, vest in him the seisin and possession of the land. This subject will be found clearly and concisely explained in the treatise below cited (*e*), where the result is shortly stated to be, that, since the Statute of Uses, it has become requisite to a feoffment, either that there should be a consideration for the gift, or that it should be expressed to be made not simply "unto," but "*unto and to the use of*" the feoffee. An inspection of any ordinary conveyance will shew, that the receipt of the nominal consideration expressed therein is acknowledged by the grantor, who would consequently thus be estopped, in the absence of fraud, from calling in question, at any future time, the fact of a consideration having passed (*f*).

Passing on to a notice of deeds other than conveyances, and assuming that there is neither fraud nor illegality in

(*d*) See Williams' Real Prop., 3rd edit. p. 131.

(*e*) Williams' Real Prop., 3rd edit. pp. 122, 132.

(*f*) See *Rex* v. *Inhabs. of Cheadle*, 3 B. & Ad. 833, 838.

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the transaction out of which the particular instrument originates, nor anything appearing in contravention of the Bankrupt or Insolvent Acts, the mere absence or failure of consideration for a bond or covenant will, in a Court of law, be wholly immaterial (*g*). Hence arises a noticeable distinction between the case of a deed founded on a past and insufficient consideration, and a deed executed with a view to carrying out an illegal purpose; the former, inasmuch as no consideration at all is required to support the contract, being good (*h*), whilst the latter will be wholly void (*i*).

With respect to contracts under seal, founded upon illegal considerations, I need here say nothing further, inasmuch as I shall presently have to inquire generally, and at some length, into the nature of the consideration for a promise and of the subject-matter of an agreement (*k*).

Specialty binds the heir.

Another peculiar characteristic of a contract under seal is this, that, in certain cases, it will bind the heir and sometimes even the devisee of the contracting party. Where, for instance, a person by bond, covenant, or other specialty, binds himself *and his heirs*, the heir and devisee are each liable and must be jointly sued for the default of the ancestor or testator, to the extent of assets freehold and copyhold which they have taken by descent or devise (*l*).

In order, however, to render the heir liable on the an-

(*g*) Per *Parke*, B., *Wallis* v. *Day*, 2 M. & W. 277.

(*h*) Argument, *Beaumont* v. *Reeve*, 8 Q. B. 485, and cases there cited; *Nye* v. *Moseley*, 6 B. & C. 133; *Friend* v. *Harrison*, 2 C. & P. 584; *Fallowes* v. *Taylor*, 7 T. R. 475, 477; *Fisher* v. *Bridges*, 2 E. & B. 118, 126, 127.

(*i*) *Binnington* v. *Wallis*, 4 B. & Ad. 650, 652; *Walker* v. *Perkins*, 3 Burr. 1568; *Fisher* v. *Bridges*, supra.

(*k*) Post.

(*l*) 11 Geo. 4 & 1 Will. 4, c. 47, s. 3. If there be no heir, the devisee may be sued alone: Id. s. 4. As to the operation of the above statute, see *Re Taylor's Estate*, 8 Exch. 384; Broom's Pract., Vol. 1, p. 503.

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cestor's specialty, it is necessary, 1st, that he be expressly named in the bond or covenant (*m*); and 2ndly, that he have assets by descent from the covenantor; for though the covenant descends to the heir, whether he inherits any estate or not, it cannot be effectually put in suit until he has assets by descent (*n*).

This liability of the heir existed at common law, though the devisee was first rendered liable in an action of debt by the stat. 3 & 4 W. & M. c. 14 (*o*), and now in an action of debt or covenant by stat. 11 Geo. 4 & 1 Will. 4, c. 47, which repeals the former enactment.

The heir of an obligor will clearly not be liable unless named in the ancestor's bond (*p*), though the personal representatives of one who contracts by specialty are, although not named, liable to the extent of assets, except on a covenant which, from its nature, must be performed by the covenantor and determines by his death (*q*).

A very remarkable distinction thus presents itself between a specialty and a simple contract, for liability in respect of the latter must be enforced, if at all, against the personal representatives of the contractor. It will, of course, be remembered that I have been here speaking of the rights and liabilities of parties at common law; for the freehold and copyhold estates of a deceased debtor have, by recent statutes, been declared assets in equity for the payment of his debts, as well by simple contract as by specialty; neverthe-

(*m*) Platt. on Cov. 449; Bac. Abr. "Heir" (D.) and (I.); *Derisly* v. *Custance*, 4 T. R. 75.

(*n*) 2 Bla. Com. 244.

(*o*) See *Farley* v. *Briant*, 3 A. & E. 847, 850, 859; per *Grose*, J., *Wilson* v. *Knubley*, 7 East, 135; *Dyke* v. *Sweeting*, Willes, 585, 587; *Hunting* v. *Sheldrake*, 9 M. & W. 256.

(*p*) See *Barber* v. *Fox*, 2 Wms. Saund. 136, 137 b; Co. Litt. 209. a

(*q*) *Hyde* v. *Dean of Windsor*, Cro. Eliz. 552, 553; *Wills* v. *Murray*, 4 Exch. 843; per *Parke*, B., *Siboni* v. *Kirkman*, 1 M. & W. 423; *Wentworth* v. *Cock*, 10 A. & E. 42.

less, it is enacted (r), that, in the administration of such assets, "all creditors by specialty, in which the heirs are bound, shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty, in which the heirs are not bound, shall be paid any part of their demands."

Specialty, how discharged.

The last characteristic of a specialty which here requires notice is, that it can only be discharged by an instrument under seal, or by the judgment of a Court of competent authority. The proposition holds generally true, that a contract thus solemnly authenticated can only be dissolved, released, or discharged by matter of as high a nature as itself.

It is obvious, that, where matter of discharge by parol from a liability under seal exists at all, it must have arisen either before or after a breach of the special contract. If it has arisen *before* breach, the rule just stated strictly holds; if *after* breach, the matter of discharge *may* sometimes afford ground of defence to an action for damages.

Of the former of these two propositions, the recent case of *The Mayor &c. of Berwick* v. *Oswald* (s) illustrates the truth. There the defendant was sued in covenant upon a bond which he had entered into as surety for the due performance of his duty by one M., who had been elected to fill the office of treasurer of the town of Berwick. The breaches assigned were, that the said M. had not paid over, nor truly accounted for, certain monies to the plaintiffs. In answer to this declaration the defendant pleaded, inter alia, that, after the making of the bond in question, and before any of the breaches of covenant alleged, the said M., and others as his sureties, executed and delivered to the plaintiffs, and the plaintiffs accepted and received from them, another

(r) 3 & 4 Will. 4, c. 104. See also 11 Geo. 4 & 1 Will. 4, c. 47, s. 9; 11 & 12 Vict. c. 44.

(s) 1 E. & B. 295; *Blake's case*, 6 Rep. 44; *Snow* v. *Franklin*, 1 Lutw. 358; *Kaye* v. *Waghorn*, 1 Taunt. 428.

bond "in full satisfaction and discharge of" that declared upon, and of all covenants, &c., contained therein. The bond thus alleged to have been given in lieu of that declared upon was similar to it, save that the defendant was not named therein as a surety. The Court held, that the plea thus put on the record was clearly bad, because an accord and satisfaction cannot be pleaded to an action upon a deed before breach, and there was nothing in the second deed which could operate as a release of that previously executed. In conformity with the decision of the Court of Queen's Bench above mentioned is that of the Court of Exchequer in *Spence* v. *Healey* (*t*), where it was held, that a covenant to pay a sum certain, after notice given, could not, before breach, be discharged by matter in pais, such as the delivery to the covenantee of goods and chattels by the covenantor.

But although it is true, that, if an action be brought on a specialty, the defendant cannot allege by way of discharge a parol agreement, made before breach, that the covenant or obligation shall not be performed; yet, after breach, a parol agreement may, where the damages sought to be recovered are unliquidated, operate by way of accord and satisfaction, and matter in pais, as payment, may so be pleaded. "Nothing," however, says *Parke*, B. (*u*), "can discharge a covenant to pay on a certain day but actual payment or tender on that day."

Blake's case (*x*) may be regarded as the leading authority

(*t*) 8 Exch. 668, and cases cited, Id. 669, n. (*b*). See also *Smith* v. *Trowsdale*, cited post, p. 306; *West* v. *Blakeway*, 2 M. & Gr. 729; *Harris* v. *Goodwyn*, Id. 405.

(*u*) *Poole* v. *Tumbridge*, 2 M. & W. 223, 226, (cited Judgment, *Haldane* v. *Johnson*, 8 Exch. 695), where it is observable, that the learned Judge is represented to have added the following words, which, however, do not appear in the *S. C.*, as reported 6 L. J., N. S., Exch. 74:—"Although, if the party afterwards chooses to receive the money, that may be pleaded by way of accord and satisfaction."

(*x*) 6 Rep. 43 b.

in support of the qualification of the general rule just specified. That was an action for breach of a covenant to repair, brought against the assignee of the lease, to which the defendant pleaded an accord between himself and the plaintiff, and execution thereof in satisfaction and discharge of his default in not repairing. Upon demurrer to this plea it was objected, that the "action of covenant was founded on the deed, which could not be discharged but by matter of as high a nature, and not by any accord or matter in pais, for *nihil tam conveniens est naturali æquitati ut unumquodque dissolvi eo ligamine quo ligatum est;* and it appears by all our books, that neither arbitrament nor accord with satisfaction is a plea when the action is grounded on a deed." But, in answer to this objection, it was resolved by the whole Court, that "the defendant's plea was good in the case at bar, for there is a difference when a duty accrues by the deed in certainty, *tempore confectionis scripti,* as by covenant, bill, or bond, to pay a sum of money, there this certain duty takes its essence and operation originally and solely by the writing, and, therefore, it ought to be avoided by a matter of as high a nature," . . . "but when no certain duty accrues by the deed, but a wrong or default subsequent, together with the deed, gives an action to recover damages," . . . "for such wrong or default accord with satisfaction is a good plea."

Applying the rules thus stated to the facts before them, the Court further observed, in *Blake's case,* that the covenant to repair did not, at the time of making it, give the plaintiff any cause of action; but the wrong or default after in not repairing, together with the deed, gave a right to recover damages (*y*): and they laid down generally, that, in all actions,

(*y*) "The distinction appears to be this: there can be no dispensation with a contract under seal except by a release under seal. Accord and sa-

where *damages only* (*z*) are to be recovered, accord with satisfaction may be pleaded (*a*); though (as we elsewhere read) "where the covenant is for the payment of a sum certain the covenantee has a right to object that the discharge is not by deed" (*b*).

The case of *Smith* v. *Trowsdale* (*c*) merits consideration in connection with the subject just adverted to; there the declaration, after stating that a submission to arbitration *under seal* had been entered into between the plaintiff and the defendants, and that an award had been made thereupon, set forth as the gist of the action the nonpayment of money due under the award. The plea to this declaration set up a new agreement *after the breach* of duty arising out of the award, whereby, in consideration of the defendants' paying a smaller sum at an earlier time, the parties mutually stipulated that this new agreement, and the performance of it by the defendants, should be accepted by the plaintiff in satisfaction of all that was to be done under the award, and of all damages sustained by reason of the breach of it. The Court were of opinion that this plea was substantially a plea of accord and satisfaction, and that there was no necessity for shewing that the agreement which it set up was under seal, the action not being brought directly

tisfaction *before breach* is therefore a bad plea in covenant, because it amounts to a dispensation. But accord and satisfaction *after breach* is a good plea, because the subject-matter of the payment and acceptance in satisfaction is,—not the covenant, which remains entire,—but the damages sustained by the particular breach of it, for which the action is brought:" 6 M. & Gr. 262 (*a*). See also *Doe* d. *Muston* v. *Gladwin*, 6 Q. B. 953; *Rawlinson* v. *Clarke*, 14 M. & W. 187.

(*z*) By which expression, apparently, must be understood *unliquidated* damages.

(*a*) 6 Rep. 44 b; *Peytoe's case*, 9 Rep. 77.

(*b*) *Spence* v. *Healey*, 8 Exch. 670.

(*c*) 3 E. & B., 83, with which compare *Braddick* v. *Thompson*, 8 East, 344.

on the deed of submission, but for the breach of duty in not performing the award. "The deed," remarked *Wightman*, J., "is only stated by way of inducement, to shew that the arbitrator had authority to bind the parties. The declaration need not have alleged that the submission was by deed."

The result of what has been above stated seems to be, that "accord and satisfaction" before breach cannot be pleaded in answer to an action of covenant; but that "accord and satisfaction" after breach will, in this action, be a good plea where "no certain duty accrues by the deed," using that phrase in the sense assigned to it in *Blake's case* (*d*).

In the particular case of a covenant or bond to pay a sum of money on a day named, payment ad diem would in effect be a plea of performance,—in the one case of the covenant—in the other of the condition of the bond, and, therefore, might, at common law, be pleaded by way of defence in an action upon the specialty. And it must be remarked, that, by statute 4 Ann. c. 16, s. 12, where debt is brought upon any *bond*, with a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, if the obligor, his heirs, executors, or administrators have *before the action brought* paid to the obligee, his executors, or administrators, the principal and interest due by the condition or defeasance, though such payment was not made strictly according to the condition or defeasance, yet it may be pleaded in bar of such action, the form of the plea in this case being, that "before action the defendant satisfied and discharged the plaintiff's claim by payment" (*e*).

(*d*) Ante, p. 304. (*e*) Com. L. Proc. Act, Sched. (B.)

Simple contract—what.

A *simple* contract is a contract either *in writing not under seal*, or *verbal*, or *implied from the acts and conduct of the parties.* It may be either *executory* or *executed* (*f*).

An *executory* simple contract is an agreement—either in writing not under seal, or verbal, or implied,—of two or more persons, on sufficient consideration, to do or not to do a particular thing (*g*).

A simple contract may be either wholly executed, i. e. each party to it may have performed that which he originally undertook to do, or it may be *executed as regards one of the contracting parties, and executory as regards the other* (*h*).

The distinctions here adverted to as existing amongst simple contracts, as well as the nature of an implied contract, will become apparent, not merely from a perusal of the pages immediately following, but from many portions of this Book,—especially those which treat of the operation of the Statute of Frauds, and of contracts mercantile or between particular persons. For the present, I purpose to restrict myself to such remarks in regard to simple contracts generally as may lay the foundation for more minute knowledge upon this subject, directing attention from time to time to a few selected cases in illustration of what is said.

Terms of contract must be definitively settled.

By the term "contract" used in the preceding paragraphs, must be understood an agreement or convention between parties, the terms of which have been *definitively arranged and settled;* for, upon an agreement inchoate merely, and incomplete, no legal remedy can be enforced.

(*f*) Ante, p. 258.

(*g*) See 2 Bla. Com. p. 442; 2 Kent Com., 7th ed., p. 560.

(*h*) Ante, p. 258. The following cases may serve to illustrate the distinction between contracts, executory and executed: *Graham* v. *Gibson*, 4 Exch. 768; *Tanner* v. *Moore*, 9 Q. B. 1; *Hochster* v. *De la Tour*, 2 E. & B. 678.

Efficacy being imparted to a contract by the mutual consent of the contractor and contractee, no such force attaches to it so long as the negotiation is still pending and open, for "till both parties are agreed either has a right to be off" (*i*).

The case of *Cope* v. *Albinson* (*j*) will illustrate the above remark. There the defendant through his agent made an offer to the plaintiffs in these words, viz. "to pay a composition of seven shillings in the pound on your (the plaintiff's) account against his (the defendant's) nephew, J. A., the younger, and on your giving proper indemnification to both. In the event of your accepting the offer I will thank you to forward me full particulars of your account, in order that the same may be properly examined." This offer was accepted by the plaintiffs, and the particulars of their account forwarded accordingly; and a reasonable time, as was alleged, having elapsed for the payment of the composition by the defendant, they brought their action against him to compel payment of the same. The Court held the action not maintainable, the agreement not having been completed between the parties. "This," observed *Parke*, B., "is an agreement for a composition upon terms *thereafter to be settled*, and is like a contract for the purchase of an estate for such a sum as the parties may think fair."

Again, if application for an absolute and unqualified allotment of shares in a projected company be made, and the letter of allotment contain the qualification that the shares are *not transferable*, the proposal and acceptance, not being ad idem, will together fail to evidence a binding contract between the applicant for shares and the company (*k*).

(*i*) Per *Best*, C. J., *Routledge* v. *Grant*, 4 Bing. 661; *Cheveley* v. *Fuller*, 13 C. B. 122; *Jordan* v. *Norton*, 4 M. & W. 155.

(*j*) 8 Exch. 185.

(*k*) *Duke* v. *Andrews*, 2 Exch. 290, cited per *Alderson*, B., *Willey* v. *Parratt*, 3 Exch. 213; *Vollans* v. *Fletcher*, 1 Exch. 20; *Wontner* v. *Shairp*, 4 C. B. 404.

But though the terms of a contract, as for the sale of goods, must be mutually agreed upon and arranged between the parties to it, the omission of the particular mode or time of payment, or even of the price itself, will not necessarily invalidate the contract. Goods, it has been remarked (*l*), may be sold, and frequently are sold, when it is the intention of the parties to bind themselves by a contract which does not specify the price or the mode of payment, leaving them to be settled by some future agreement, or to be determined by what is reasonable under the circumstances. And, accordingly, if the evidence in any given case shews that the parties intended to bind themselves by a contract of sale, the agreement may be binding so as to pass the property in the thing bargained for, although one or other of the matters just mentioned has not been definitively settled (*m*). In any such case the Court will endeavour to ascertain the real intention of the parties, and, having done so, to effectuate it (*n*).

With reference more particularly to mercantile contracts, which are so frequently concluded by written correspondence between parties, it may be proper to add, that, where a contract is made by letter between A. and B., A. making an offer, and B. accepting that offer *unconditionally*, the contract will be complete when B.'s letter is posted, although it may chance not to reach its destination (*o*).

Mutuality—what.

Again, there must be *reciprocity of assent* between the parties to a contract in order that it may be complete and

(*l*) *Valpy* v. *Green*, 4 C. B. 837, 864. See also Atkinson on the Contract of Sale, pp. 49 et seq.

(*m*) *Valpy* v. *Green*, supra.

(*n*) See *Read* v. *Fairbanks*, 13 C. B. 697

(*o*) *Duncan* v. *Topham*, 8 C. B. 225; *Dunlop* v. *Higgins*, 1 Ho. L. Cas. 381. Per *Wilde*, C. J., *Harvey* v. *Johnston*, 6 C. B. 304; *Adams* v. *Lindsell*, 1 B. & Ald. 681.

binding (*p*); and if the term *mutuality* be used as synonymous with "reciprocity of *assent*," it will be true to say, that there *must be mutuality in a contract* (*q*). The term in question is, however, often employed to signify "reciprocity of *obligation*," and in this sense the rule which has been just stated does not invariably hold true. Important classes of contracts might indeed be specified, in which, on their inception, legal liability attaches and can be enforced as against one only of the contracting parties (*r*). For instance, an agreement within the 4th section of the Statute of Frauds will bind the party who has signed it, although there may be no legal remedy at his suit against the other by reason of this latter party having omitted to sign it (*s*). The contract of an infant is in most cases voidable at his election, though quoad an adult contracting with him it absolutely binds (*t*). The individual who executes a good legal guarantee assumes liability, without having any power to compel the party to whom such security is given to supply the goods, or to extend the credit in pursuance of the terms of

(*p*) Ante, p. 260.

(*q*) A simple instance, shewing what is meant by 'mutuality,' presents itself in the ordinary contract of sale (already alluded to antè, p. 310). "There must," says *Wilde*, C. J., in *Wood* v. *Copper Miners' Co.*, 7 C. B. 936, "be two parties to a transaction to make it enure as a purchase. When two persons *mutually agree* that one of them shall purchase goods of the other, that amounts to a *contract* that the one shall sell and that the other shall buy." In the case here put, there is obviously reciprocity of assent ad idem, as between the vendor and vendee. As to mutuality in contracts of hiring and service, see *Reg.* v. *Welch*, 2 E. & B. 357; *Hartley* v. *Cummings*, 5 C. B. 217; *Pilkington* v. *Scott*, 15 M. & W. 657; *Sykes* v. *Dixon*, 9 A. & E. 693; *Emmens* v. *Elderton*, 13 C. B. 495; *Rust* v. *Nottidge*, 1 E. & B. 99.

(*r*) See *Harvey* v. *Johnston*, 6 C. B. 295; *Mills* v. *Blackall*, 11 Q. B. 358, 366; *Gibson* v. *Carruthers*, 8 M. & W. 321; *Marsh* v. *Wood*, 9 B. & C. 659; *Kearsey* v. *Carstairs*, 2 B. & Ad. 716; *Fairburn* v. *Eastwood*, 6 M. & W. 679.

(*s*) *Laythoarp* v. *Bryant*, 2 Bing. N. C. 735; post, Chap. II., Sect. 1.

(*t*) *Holt* v. *Ward*, 2 Stra. 937; post.

the guarantee (*u*). This is clearly explained by *Parke*, B. (*x*), who remarks, that, where one person says to another 'in case you choose to employ this man as your agent for a week, I will be responsible for all such sums as he shall receive during that time and neglect to pay over to you.' The party indemnified is not, therefore, bound to employ the person designated by the guarantee; but if he do employ him, then the guarantee attaches, and becomes binding on the party who gave it.

The case of *Burton* v. *The Great Northern Railway Company* (*y*) may be cited for the purpose of shewing what is meant by 'want of mutuality' in a contract. There the plaintiff, by a memorandum of agreement between himself and a railway company (the defendants), undertook to provide waggons, horses, &c., for the cartage of merchandise between H. and W., and to convey all such as might be presented to him for conveyance between those places. And he further undertook to perform all business intrusted to him, promptly and carefully, at a certain specified rate. And it was mutually agreed, that the arrangement aforesaid should continue in force for the period of twelve months from the date thereof. The defendants having, before the expiration of that period, by written notice, terminated the agreement, the plaintiff sued them for breach of contract. But the Court of Exchequer, besides holding that the declaration, as framed upon the above agreement, was not

(*u*) Per *Wightman*, J., *Mills* v. *Blackall*, 11 Q. B. 366.

(*x*) *Kennaway* v. *Treleavan*, 5 M. & W. 501.

(*y*) 9 Exch. 507. As to want of mutuality—in contracts under seal, see *Aspdin* v. *Austin*, 5 Q. B. 671; *Dunn* v. *Sayles*, Id. 685;—in contracts under seal, executed by one party only, see *British Empire Mutual Life Ass. Co.* v. *Browne*, 22 L. J., C. P., 51; *Morgan* v. *Pike*, 23 L. J., C. P., 64; *Swatman* v. *Ambler*, 8 Exch. 72; *Pitman* v. *Woodbury*, 3 Exch. 4; *Wheatley* v. *Boyd*, 7 Exch. 20; in contracts with corporations, post.

supported by it, intimated a strong opinion that no action at all could, even if an amendment were made in the declaration, be maintained upon the contract in question against the company, inasmuch as it contained no provision binding them to send goods to the plaintiff for conveyance, and was, in fact, unilateral merely, and without mutuality.

Analysis of a simple contract.

If we attempt to analyse a simple contract, the terms of which have been definitively arranged between the parties to it (z), or to trace the progressive steps in its creation, we shall find that there must have been a *request* to the contractee by the contractor—a *consideration* moving from the contractee to the contractor—a *promise* by the contractor to the contractee to do, or to refrain from doing, a particular thing. Of these three ingredients in a contract, viz. the *request*—the *consideration*—and the *promise*—I shall briefly treat in the order just indicated, although it will be desirable for the reader, before perusing that which immediately follows, to familiarise himself with the definition of a 'consideration' given at p. 322.

Request.

1. To constitute a contract valid in law there must have been a *request* to the contractee by the contractor. This request, however, need not, in all cases, have been express; it will very often be implied by law. Let us first take the case of an executory contract, as "in consideration that you will serve me a year—I will give you 10*l*." This is equivalent to saying, "in consideration that you, *at my request*, will serve me," &c. In this case, therefore, and in every case where the consideration of a promise is executory, there must have been a request, or something tantamount to it, on the part of the promisor (a).

Where, however, the act relied upon as the consideration

(z) Ante, p. 308.

(a) 1 Smith L. C. 69, 70.

for a promise is wholly past and executed (*b*), it is obvious that such act may or may not have been done at the request of the promisor, ex. gr. it may have been a mere voluntary courtesy. The rule first to be noticed upon this subject accordingly is, that "a bygone consideration, unless supported by a request, will not sustain a subsequent promise" (*c*). "If," says Mr. Chancellor *Kent* (*d*), "the consideration be wholly past and executed before the promise be made, it is not sufficient, unless the consideration arose at the instance or request of the party promising." Thus, if a man disburse money about the affairs of another without request, and then the latter promise, that, in consideration of the former having laid out the money for him, he will pay him 10*l.*, that is not a good consideration, being completely executed (*e*).

Where, indeed, the act stated as the consideration for a promise cannot, from its nature, have been a gratuitous kindness, but necessarily imports a request, such request need neither be averred nor specifically proved,—as in the case of money lent; for the mere statement that money was lent, implies that it was advanced *at the request of* the party to whom the loan was made (*f*).

Again, where the party whom it is sought to charge upon a contract has derived benefit from that which is alleged to be the consideration for his promise, the acceptance and

(*b*) Post, pp. 330, 332.

(*c*) Per *Tindal*, C. J., *Thornton* v. *Jenyns*, 1 M. & Gr. 188, citing *Hunt* v. *Laker*, Dyer, 272, and *West* v. *West*, 1 Rolle Abr. 11; *King* v. *Sears*, 2 Cr. M. & R. 48.

(*d*) Comm. 7th ed., vol. 2, pp. 585–6.

(*e*) Judgment, 1 M. & Gr. 188–9; *Lampleigh* v. *Brathwait*, Hob. 105, and 1 Smith L. C. 67, where the law upon the subject adverted to in the text is fully set forth.

(*f*) *Victors* v. *Davies*, 12 M. & W. 758, citing 1 M. & Gr. 265, n.; *M'Gregor* v. *Graves*, 3 Exch. 34; with which compare *Brittain* v. *Lloyd*, 14 M. & W. 762, cited *Lewis* v. *Campbell*, 8 C. B 541, and post.

enjoyment of this benefit will, in legal contemplation, suffice to imply an antecedent request. If, for instance, a man buys goods for me without my knowledge or request, and afterwards I agree to receive the goods, my conduct, as shewing a ratification of the contract, will dispense with the necessity of proving an express request(*g*), according to the maxim *omnis ratihabitio retrotrahitur et mandato priori æquiparatur*(*h*). So, if A. B., unauthorised by me, makes a contract on my behalf with C. D., which I afterwards recognise and adopt, there is no difficulty in dealing with this contract as having been originally made by my authority. If C. D. entered into the contract on the understanding that he was dealing with me, when I afterwards agree to admit that such was the case, C. D. is precisely in the condition in which he meant to be. If, on the other hand, C. D. did not believe A. B. to be acting for me, his condition is not altered by my adoption of the agency; for he may sue A. B. as principal at his option, and has the same equities against me, if I sue, which he would have had against A. B.(*i*).

I have said(*k*), that the request to do the act which is to constitute the consideration for the subsequent promise may be express or implied, i. e. the request may be direct and explicit, or it may be indirect, to be collected from circumstances, and supplied by intendment of law. In support of these remarks a few illustrative observations may be needed.

It is clear, then, that if one requests another to pay money for him to a stranger, there is to be implied, in the absence

(*g*) 1 Wms. Saund. 264 (1).

(*h*) Leg. Max, 2nd ed., pp. 596, 676; *Paynter* v. *Williams*, 1 Cr. & M. 810, cited post p. 319.

(*i*) Judgment, *Bird* v. *Brown*, 4 Exch. 798–9; *Mitcheson* v. *Nicol*, 7 Exch. 929; *Peto* v. *Reynolds*, 9 Exch. 410.

(*k*) Ante, p. 313.

of any express promise, an undertaking to repay it; so that the amount, when paid, is a debt due to the party paying from him at whose request it is paid: and it is here wholly immaterial whether the money is paid in discharge of a debt due to the stranger, or as a loan or gift to him. The request to pay, and the payment according to it, create a legal liability which attaches to the party making the request. But, further, whether the request be direct—as, where the party is expressly desired by the defendant to pay; or indirect—as, where he is placed by him under a liability to pay, and does pay, is immaterial. If one ask another, instead of paying money for him, to lend him his acceptance for his accommodation, and the acceptor is obliged to pay it, the amount is money paid for the borrower, although the borrower be no party to the bill, nor in any way liable to the person who ultimately receives the amount. The borrower, by requesting the acceptor to assume that character, which ultimately obliges him to pay, impliedly requests him to pay, and is as much liable to repay as he would be on a *direct request* to pay money for him with a promise to repay it(*l*).

The case last suggested illustrates the important proposition, that, where one party for and at the request of another enters into a legal liability to pay money, a request to pay the money is implied by law from the fact of entering into the engagement. If the debt or liability is incurred entirely for a principal, the surety having become liable for him at his request, and being obliged to pay, is held, at law, to pay on an implied request from the principal that he will do so(*m*).

(*l*) Judgment, *Brittain* v. *Lloyd*, 14 M. & W. 773.

(*m*) Judgment, 2 E. & B. 296. "The count for money paid proceeds on one of two suppositions: either that the plaintiff has paid the

From the rule just laid down, which is applicable, in its terms, to the particular case of principal and surety, may readily be derived the doctrine of contribution amongst joint contractors. In a joint contract entered into for the benefit of all, each contractor takes upon himself a liability to pay the whole debt, and each, in effect, takes upon himself a liability for each to the extent of the amount of his share; each, therefore, may be considered as becoming liable for the share of each one of his co-contractors, *at the request* of such co-contractor, and on being obliged to pay such share, a request to pay it is implied as against the party who ought to have paid it, and who is relieved from paying what, as between himself and the party who pays, he ought himself to have paid according to the original arrangement (*n*).

The principle just stated applies where one of several joint contractors has, by legal process, been compelled to pay the joint debt, whether the action was brought against him alone, or whether, judgment having been obtained against all the parties jointly liable, execution was issued and satisfaction enforced against one only (*o*). But this right to contribution will be affected by any original arrangement or convention inter partes, inconsistent with the understanding that each is to pay his own share only. If, by express arrangement, one of the joint contractors, though liable to the creditor, is not, as between himself and his co-contractors to be liable to pay any portion of the debt, it is clear that no action to compel contribution could be main-

money for the defendant at his request; or that he has been compelled to pay money, for which the defendant was liable to the person receiving it, as in the case of a surety paying the debt of his principal, and similar cases." Judgment, *Sayles* v. *Blane*, 14 Q. B. 205.

(*n*) *Batard* v. *Hawes*, 2 E. & B. 287, 296. See *Wallis* v. *Swinburne*, 1 Exch. 203.

(*o*) *Toussaint* v. *Martinnant*, 2 T. R. 100; *Earl of Mountcashell* v. *Barber*, 23 L. J., C. P., 43.

tained against him (*p*). So, where one surety enters into an engagement of suretyship at the request of his co-surety, it has been held, that the co-surety, paying the whole debt, can maintain no action (*q*). In such cases, the rule applies —*expressum facit cessare tacitum*—the request to pay, which, as above explained, the law ordinarily implies from one joint contractor to his co-contractor, can have no existence where there is an express contract inconsistent with it. Nor, to anticipate a little what I shall presently have to say, could there, under such circumstances, be implied a promise for repayment, because, "promises in law," as remarked by *Buller*, J., (*r*) "only exist where there is no express stipulation between the parties."

Without attempting to pursue any further the inquiry as to the rights of a surety against his principal or co-surety, or of one of several joint contractors who has been compelled to pay the joint debt against his co-contractors (*s*), we may conclude, that, in every case in which there has been a payment of money by a plaintiff to a third party at the request of the defendant, express or implied, on a promise, express or implied, to repay the amount, an action for "money paid by the plaintiff for the defendant at his request" (*t*) will lie (*u*); and, further, we may conclude, that a request to pay will be implied whenever the consideration consists in the plaintiff's having been compelled to do that to which the defendant was legally compellable (*v*).

(*p*) *Turner* v. *Davies*, 2 Esp. 178; *Done* v. *Walley*, 2 Exch. 198.

(*q*) See the judgment, *Batard* v. *Hawes*, 2 E. & B. 297.

(*r*) *Toussaint* v. *Martinnant*, 2 T. R. 105; *Driver* v. *Burton*, 21 L. J., Q. B., 157.

(*s*) These subjects are discussed at length in 1 Smith L. C. 70 d et seq.

(*t*) Com. L. Proc. Act, Sched. (B.)

(*u*) Judgment, *Brittain* v. *Lloyd*, 14 M. & W. 773.

(*v*) 1 Smith L. C. 70 a; Chitt. Contr. 3rd ed., p. 62.

But, besides the class of cases just considered, another presents itself, the characteristic of which is, that the plaintiff has *voluntarily* done that to do which the defendant was legally compellable; in such cases the law will imply an antecedent request, provided the defendant has, in consideration of the plaintiff's act, *expressly* promised to indemnify or reimburse him (*w*).

The cases usually cited (*x*) as falling within the above rule, might perhaps be supported by applying the ordinary doctrine of ratification (*y*) to the facts there appearing. In each of these cases, if scrutinised, there seems to have been either acquiescence on the part of the defendant during the performance of the act alleged as a consideration by the plaintiff (*z*), or, at all events, something equivalent to an acknowledgment by the defendant, that the plaintiff had acted at his request (*a*).

Again, where the act of the plaintiff and the promise of the defendant take place at one and the same time, the law does not require, as in the case of a bygone transaction, that, in order to make the promise binding, the plaintiff should have acted at the request of the defendant. In *Tipper* v. *Bicknell* (*b*) the declaration stated, that, the defendants being in possession of certain mortgage deeds, of which A. was desirous to obtain an assignment by the payment of 500*l.*, the plaintiff consented, at A.'s request, to accept bills to that amount drawn by A., upon A.'s procuring the defendants to deliver the deeds to the plaintiff as a security; and that the defendants, in consideration of the

(*w*) 1 Smith L. C 70 a; Chitt. Contr., 3rd ed., p 62; *Wennall* v. *Adney*, 3 B. & P. 250, n.

(*x*) *Wing* v. *Mill*, 1 B. & Ald. 104; *Paynter* v. *Williams*, 1 Cr. & M 810.

(*y*) Ante, p. 315.

(*z*) See per *Bayley*, B., 1 Cr. & M. 819, 820; *Lamb* v. *Bunce*, 4 M. & S. 275.

(*a*) Per *Bayley*, J., 1 B. & Ald. 106.

(*b*) 3 Bing. N. C. 710.

plaintiff's accepting the bills (but without alleging any request on their part), undertook to deliver the deeds to him upon his paying them the amount of the bills: it was held, that a sufficient consideration appeared for the defendants' promise, as, from the above statement, it must be inferred, that the act of the plaintiff and the promise of the defendants were simultaneous, taking place in the presence of the parties, and therefore rendering it unnecessary that the plaintiff should have acted at the defendants' request (*c*). The case just cited will be found to illustrate the nature of a 'concurrent' consideration hereafter adverted to (*d*), and is expressly in point to shew, that, where the consideration moving from the one party and the promise or undertaking of the other are simultaneous, the law dispenses with proof of any previous request from the promisor to the promisee.

The case of *Massey* v. *Goodall* (*e*) offers a good illustration of the nature of a 'continuing' consideration (*f*), and shews, that, where there is such a consideration, an express request by the party whom it is sought to charge will be unnecessary. There the declaration stated, that "the defendant *had become and was* tenant from year to year to plaintiff of a certain farm," &c., on certain stipulations, for nonobservance whereof specific penalties were to be payable by the defendant, and in consideration thereof he (the defendant) then promised the plaintiff that he would pay the plaintiff all such penalties as he might be liable to pay, according to the said stipulations, &c. The breach alleged was nonpayment of certain penalties. Upon demurrer to defendant's plea to the above declaration, it was, inter alia, argued on his behalf that the declaration was bad, inasmuch as from the consideration there laid, which was *by-gone* (*g*), no

(*c*) *Tipper* v. *Bicknell*, 3 Bing. N. C. 710.

(*d*) Post, p. 330.

(*e*) 17 Q. B. 810.

(*f*) As to which, see post, p. 330.

(*g*) Post, p. 332.

promise such as was there laid could, in the absence of an express request, be implied by law. To this argument, however, *Patteson*, J, replied, "I take it that it is only necessary to lay a request where the consideration was *wholly* bygone and executed at the time of the promise, and that it is not necessary when it is a *continuing* consideration, as this is, where the terms would continue after the promise throughout the whole tenancy. *King* v. *Sears* (*h*), and other cases, I think, establish that distinction." And, again, the same learned Judge observed, "I agree that a past consideration will support the promise implied by law, and, as a general rule, will support no other promise. But, here the defendant became tenant to the plaintiff on certain terms; whatever those terms were, the law would imply a promise to observe them; and the promise laid here is no more than a promise to observe one of those terms, that is, to pay penalties according to those stipulations."

The point decided in the preceding case will probably be better understood when the nature of a legal consideration, past, concurrent, and continuing, future or executory, has been investigated.

To sum up what has been said in the preceding pages respecting the first of the three ingredients, (viz. the request) already specified (*i*), as forming a complete contract. In every executory contract, there must, ex necessitate rei, have been a request on the part of the person promising (*j*). In certain species of executed contracts, as where money has been lent, there must also necessarily have been a request antecedent to the consideration. In general, however, where a contract is executed, the law requires that a request express or implied be shewn. And a request will be implied—

(*h*) 2 Cr. M. & R. 48. (*i*) Ante, p. 313. (*j*) 1 Smith L. C. 69, 70.

1. Where the doctrine of ratihabitio properly applies—2. Where the plaintiff has been compelled to do that which the defendant was legally compellable to do—3. Where the plaintiff has voluntarily done that which the defendant was legally compellable to do, and the latter has afterwards expressly promised—4. Where the consideration moving from the plaintiff and the promise of the defendant were simultaneous—5. Where the consideration is continuing.

Consideration—what.

2. Any act of the plaintiff from which the defendant derives a benefit or advantage, or any labour, trouble, detriment, or inconvenience, performed, taken, or sustained by the plaintiff, however small the benefit or inconvenience may be (*k*), may suffice, in law, as a '*consideration*' to support a promise, and to sustain an action ex contractu. "A prejudice to the promisee incurred at the request of the promisor may be a consideration, as well as a benefit to the promisor proceeding from the promisee; but this must be a prejudice on entering into the contract, not a prejudice from the breach of it" (*l*).

"An engagement," says *Parke*, B. (*m*), "by a person to remunerate the act of another, which benefits the former, or puts the latter to any inconvenience or loss, is a binding engagement." And, again, "consideration," says *Patteson*, J. (*n*), "means something which is of *some value* in the eye of the law, moving from the plaintiff. It may be some benefit to the defendant, or some detriment to the plaintiff, but, at all events, it must be *moving from the plaintiff* (*o*)," that is to say, there must be some kind of *privity* between the plaintiff and defendant in order to sustain an action ex contractu at suit of the former against the latter.

(*k*) 1 Selw. N. P., 11th ed., p. 42.

(*l*) Judgment, *Gerhard* v. *Bates*, 2 E. & B. 487-8; *Crowther* v. *Farrer*, 15 Q. B. 677, 680.

(*m*) *Moss* v. *Hall*, 5 Exch. 50.

(*n*) *Thomas* v. *Thomas*, 2 Q. B. 859.

(*o*) See also per *Erle*, J., *Kilham* v. *Collier*, 21 L. J., Q. B., 65.

Privity—what.

The term 'privity,' when used by legal writers, must be understood to mean 'a connection or bond of union (*p*) (ligamen) existing between parties in relation to some particular transaction;' and when it is said that an action will not lie for 'want of privity' this phrase signifies that the plaintiff and defendant are strangers to each other quoad the subject matter in dispute, or, at all events, that the plaintiff, the contractee, did not with sufficient directness conduce to the consideration for the undertaking or promise of the defendant the contractor.

It will readily be inferred from the definitions of a legal 'consideration' above given, that its nature may infinitely vary: "wherever," indeed, "a man may do an act without a breach of any legal or moral obligation, that act may be a valid consideration for a promise to pay money to him" (*q*), or to do any other thing. A few cases must, however, here suffice to shew the nature of a good legal consideration, as well as of that privity to which I have alluded as requisite in order to support an action upon simple contract.

Where plaintiff stipulated to discharge A. from a portion of a debt due to himself, and to permit B. to stand in his place as to that portion, defendant stipulating in return that B. should give plaintiff a promissory note, the consideration moving from plaintiff, viz. his agreement to permit B. to stand in the place of A. as his debtor, being an undertaking in legal contemplation detrimental to him, was held sufficient to sustain the promise by defendant (*r*).

In connection with the preceding case that of *Lyth* v. *Ault* (*s*) may be consulted, which offers a curious illustration

(*p*) Per *Wilde*, C. J., *Blandy* v. *De Burgh*, 6 C. B. 634.

(*q*) Per Lord *Campbell*, C. J., *Hall* v *Dyson*, 21 L. J., Q. B., 224, 226.

(*r*) *Peate* v. *Dicken*, 1 Cr M. & R. 422

(*s*) 7 Exch. 669.

of the nature and sufficiency of the consideration which will support a promise at law. There the acceptance by a creditor of the sole and separate liability of one of two *joint* debtors was held to be a good consideration for an agreement to discharge the other debtor from liability. It might, indeed, primâ facie, seem that the contract here disclosed was a mere nudum pactum, on the ground that the creditor would get nothing in return for his relinquishment of his claim against such last-mentioned party; but a little reflection will shew that the substituted liability was in its nature different from that which originally subsisted, so that, inasmuch as the Court will not inquire into the adequacy of the consideration for a promise (*t*), the agreement in question would be unimpeachable in a strictly legal point of view. It is, moreover, demonstrable, as remarked by *Alderson*, B., in the case before us, that the sole security of A. *may* be a better thing than the joint security of A. and B.; for by accepting the sole security of A., instead of the joint security of both debtors, the creditor possesses a legal remedy against A. during his lifetime, and against his assets after his death, and no security whatever against B. Whereas, in the case of a joint security, after the death of A., there exists a legal liability of B., and no legal liability of A's. assets, but an equitable remedy against the assets of A., subject to the necessity of making B. a party to a suit in equity. Now, these two securities are different things, and therefore a bargain to take the one for the other is good. Cases may be suggested of A. being rich and B. poor, in which the advantage of taking A. as the debtor in lieu of A. and B. is clear; or it may be that A. is as rich as B., in which case the creditor may fairly consider that one debtor alone is preferable to both together (*u*).

(*t*) Per *Parke*, B., 7 Exch. 671. (*u*) 7 Exch. 674-5.

But, although a Court of law will not inquire into the adequacy of the consideration for a promise, it will inquire so far as to satisfy itself that the consideration is of some value (*v*), and not illusory merely (*x*). Where, therefore, the consideration for the defendant's promise was stated to be the release and conveyance by the plaintiff of his interest in certain premises at the defendant's request, but the declaration did not shew that the plaintiff had any interest in the said premises, except a lien upon them, which was expressly reserved by him, the declaration was held bad as disclosing no legal consideration for the alleged promise (*y*). So, in *Fremlin* v. *Hamilton* (*z*), a declaration setting forth a memorandum of agreement of demise and for a lease was held bad, on the ground that it disclosed no consideration for the alleged agreement on the part of the testator; and it was remarked *per Cur.*, that, although "the Procedure Act has no doubt afforded great latitude in pleading," yet "it has not removed the necessity of stating a consideration for an agreement upon which a party is sought to be charged" (*a*).

Again, where, A. being indebted to the plaintiff in a certain amount, and B. being indebted to A. in another amount, the defendant, in consideration of being permitted by A. to sue B. in his name, promised to pay A.'s debt to the plaintiff, and A. gave such permission; whereupon the defendant recovered from B.: judgment was arrested, on the ground

(*v*) Per *Patteson*, J., *Thomas* v. *Thomas*, cited ante, p. 322; judgment, *Haigh* v. *Brooks*, 10 Ad. & E. 320.

(*x*) *White* v. *Bluett*, 23 L. J., Exch., 36.

(*y*) *Kaye* v. *Dutton*, 7 M. & Gr. 807, cited *Smart* v. *Sandars*, 5 C. B. 904; *Edwards* v. *Baugh*, 11 M. & W. 641; *Strickland* v. *Turner*, 7 Exch. 208; *Wright* v. *Colls*, 8 C. B. 150; *Ashworth* v. *Mounsey*, 9 Exch. 175. See *Bridgman* v. *Dean*, 7 Exch. 199.

(*z*) 8 Exch. 308.

(*a*) See *Hutchinson* v. *Read*, 4 Exch. 761; *Orme* v. *Galloway*, 9 Exch. 544.

that the plaintiff was a *mere stranger to the consideration* for defendant's promise, having done nothing of trouble to himself or of benefit to the defendant(*b*).

It will be remarked, that the case last cited shews not only the nature of a sufficient legal consideration for a promise, but also the necessity of *privity* (*c*) between the parties to an action founded upon promises, in order that it may be sustainable. In *Cobb* v. *Becke*(*d*) this latter point receives apt illustration; there B., the country attorney of A., sent a sum of money to the defendants, who were B.'s London agents, to be paid to C on account of A., and the defendants promised B. to pay the money transmitted according to his, B.'s, directions; but, afterwards, being applied to by C., refused to pay it, claiming a balance due to themselves from B. on a general account between them. Upon this state of facts, it was held, that an action for money had and received would not lie against the defendants at suit of A. "The general rule," said Lord *Denman*, C. J., "undoubtedly is, that there is *no privity* between the agent in town and the client in the country: the former cannot maintain an action against the latter for his fees, nor the latter against the former for negligence. Something, therefore, is necessary, beyond the mere relation of the parties to each other as above stated, to make the agent in town liable to the client." The subject here touched upon is more fully explained in *Robbins* v. *Fennell*(*e*), where it is laid down that the client cannot maintain an action for money had and received against the town agent of his attorney, "unless the law will imply a contract to pay on request, from the relation which the several parties bear towards each other."

(*b*) *Bourne* v. *Mason*, 1 Ventr. 6; *Crow* v. *Rogers*, 1 Stra. 592; *Price* v. *Easton*, 4 B. & Ad. 433.

(*c*) Ante, p. 323.

(*d*) 6 Q. B. 930.

(*e*) 11 Q. B. 248, 256.

Now the client employs the country attorney, is answerable to him for costs, and in case of negligence or misconduct must come upon him for redress. He is entitled to credit for all sums which the attorney may happen to owe him, and though he probably knows that the business must be carried on by a town agent, his payment for it to such agent is no discharge to him against the attorney (*f*). In like manner the attorney employs and is liable to the town agent, who knows nothing of the client but his name, and is not even to that extent known by him. The town agent could not maintain an action for work and labour against the client by whom he was *not* employed; and the rights and liabilities of the parties in such a case would be reciprocal (*g*).

A simple instance of the necessity of privity between parties in order to sustain an action founded upon contract is given by *Parke*, J., in *Baron* v. *Husband* (*h*), who says, "If I give a sum of money to my servant to pay a tradesman, the latter cannot maintain an action for money had and received against the servant." So, where A. contracts with B., acting *as agent for* C., the legal privity is between A. the contractor and C. the contractee; so that B. can in general neither sue nor be sued upon the contract (*i*).

But, although "the remedy for breach of contract is by the general rule of our law confined to the contracting parties" (*k*), there are some cases, as we shall presently see, in

(*f*) *Yates* v. *Freckleton*, 2 Doug. 623.

(*g*) Judgment, 11 Q. B. 256. See *Robbins* v. *Heath*, Id. 257, (*c*).

(*h*) 4 B. & Ad. 611, 612; *Williams* v. *Everett*, 14 East, 582; *Lilly* v. *Hays*, 5 Ad. & E. 548.

(*i*) See, further, as to want of privity, *Hill* v. *Kitching*, 3 C. B. 299; *Barlow* v. *Browne*, 16 M. & W. 126; *Hooper* v. *Treffry*, 1 Exch. 17; *Driver* v. *Burton*, 21 L. J., Q. B., 157; *Kilham* v. *Collier*, Id. 65; *Robertson* v. *Wait*, 8 Exch. 299.

(*k*) Per *Coleridge*, J., *Lumley* v. *Gye*, 2 E. & B. 246.

which the law will imply not merely the request but also the promise of the contractor (*l*); and there are other cases in which an obligation to pay money is imposed, either by the law of the land, or by virtue of the bye-law of some corporate body—which bye law within its limits, and with respect to the persons upon whom it lawfully operates, has the same effect as an Act of Parliament has upon the community at large (*m*). Further, an action of debt will lie not merely where there is a contract express or implied between the parties, but wherever there is a legal right on the one side to receive the money sued for, and a legal liability on the other to pay it (*n*). Debt will also lie for recovery of a penalty under a statute (*o*).

In *Gerhard* v. *Bates* (*p*) the 1st count of the declaration alleged, that, before the defendant's promise after mentioned, the defendant and others had formed a company, the capital of which was divided into a certain number of 1*l.* shares, out of which 12,000 were to be appropriated to the public at 12*s.* 6*d.* per share, free from further calls—that the defendant was a promoter and managing director of the company, and, in offering the said 12,000 shares to the public, had, in such character, "guaranteed and promised to the bearers" of those shares a minimum annual dividend of 33 per cent., payable half-yearly, and that the said guarantee and promise should remain in force until the said

(*l*) Ante, p. 313; post, p. 331.

(*m*) Per Lord *Abinger*, C. B., *Hopkins* v. *Mayor of Swansea*, 4 M. & W. 640; 3 Bla. Com. 160.

(*n*) *Addison* v. *Mayor of Preston*, 12 C. B. 108, 133.

"Wherever a statute enacts anything or prohibits anything for the advantage of any person, that person shall have remedy to recover the advantage given him, or to have satisfaction for the injury done him contrary to law by the same statute; for it would be a fine thing to make a law by which one has a right but no remedy except in equity:" Per *Holt*, C. J., 6 Mod. 27.

(*o*) 3 Bla. Com. 161.

(*p*) 2 E. & B. 476.

12*s.* 6*d.* per share should be thus repaid to the bearers of the 12,000 shares before mentioned. The declaration then averred, that the plaintiff, confiding in the defendant's said promise, became the purchaser and bearer of 2500 of the 12,000 shares at 12*s.* 6*d.* per share, and took the same on the faith of the defendant's guarantee and promise, and not otherwise, and had fulfilled the engagement on his part, yet that the defendant had not paid any dividend. This count of the declaration was held to be bad on demurrer: 1st, because it did not sufficiently allege any promise to the plaintiff (*q*); 2nd, because there appeared to be an entire absence of consideration, inasmuch as it was not stated, that, "from the plaintiff's buying and becoming bearer of" the shares mentioned, any benefit accrued to the defendant; or that, at the time when the contract was supposed to have been entered into, any prejudice accrued to the plaintiff; 3rd, because there was nothing to shew any request by the defendant to the plaintiff, and no privity was established between them. I have mentioned this case at some length, in order that the count above abstracted may be compared with the second count of the declaration hereafter noticed in connexion with actions founded upon tort, and with the rule as to privity applicable in the latter class of cases.

With the facts and decision in *Gerhard* v. *Bates*, so far as above mentioned, may usefully be contrasted that peculiar class of cases there alluded to by Lord *Campbell*, in which it has been held, that an action may be maintained for a reward offered in a public advertisement, at suit of one who has fulfilled the conditions indicated therein (*r*). In such cases there might at first sight seem to be a want of privity, there is, however, a distinct promise to any one who shall

(*q*) As to which, post, p. 331.

(*r*) See *Williams* v. *Carwardine*, 4 B & Ad. 621; *Lockhart* v *Barnard*, 14 M. & W. 674; *Lancaster* v. *Walsh*, 4 M & W. 16; *Thatcher* v. *England*, 3 C. B. 251.

bring himself within the terms of the advertisement; and there is a good consideration for the promise in the benefit to accrue to the promisor,—as in shewing that he is heir-at-law to a person who died seised of real property and intestate; or prejudice to the promisee,—as, that he shall entitle himself to the reward by voluntarily coming forward as a witness. Those cases, nevertheless, remarked Lord *Campbell*, although not now to be questioned, are somewhat anomalous, and "the party who makes the discovery might perhaps have been permitted to sue for work and labour done and performed at the request of the defendant, the sum stated in the advertisement being used as evidence of what ought to be recovered on a quantum meruit."

The meaning of the term 'consideration' and of 'privity' being now apparent, it will be convenient to notice, that the consideration may be altogether *past and executed* at the time when the promise is made; it may be contemporaneous or *concurrent* with the promise (*s*), as, where two persons meet together and reciprocally promise to do certain specified things, the promise of the one party being the consideration for the promise of the other (*t*). It may sometimes be correctly designated as '*continuing*,' as in *Powley* v. *Walker* (*u*), where the subsisting relation of landlord and tenant was held to be a sufficient consideration for the tenant's promise to manage a farm in a husbandlike manner. Lastly, the consideration may be *executory*—as, where A., in consideration that B. will do something specified at a future day, promises that he will himself do some

(*s*) See *West* v. *Jackson*, 16 Q. B. 380; *Tipper* v. *Bicknell*, cited ante, p. 319; *Thornton* v. *Jenyns*, 1 M. & Gr. 166; *Harvey* v. *Johnston*, 6 C. B. 295.

(*t*) "Mutual promises to perform agreements" are not to be averred in pleading: Com. L. Proc. Act, s. 49.

(*u*) 5 T. R. 373; recognised *Beale* v. *Sanders*, 3 Bing. N. C. 850. See also *Massey* v. *Goodall*, cited ante, p. 320.

other thing(*x*). Now, in this case, difficulty may be felt in determining whether the promise made by one of these parties is, in truth, the consideration for that made by the other of them, or whether the performance of the one promise be the consideration for the other, in which latter case such performance will constitute a condition precedent to the right to sue. This difficulty can only be surmounted by looking narrowly at the words of the agreement entered into, and at the intention of the contracting parties(*y*).

The promise —what.

3. The third ingredient which enters into the conception of a simple contract, complete in all its parts, is the *promise* to do or not to do a particular thing made by the contractor to the contractee(*z*). In every executory contract it is clear that there must be a promise—express or implied—by the former of these parties to the latter; for, if A. request B. to do something for him, and B. does it, the law will (if necessary) imply a promise by A. to remunerate B. for the trouble taken or inconvenience suffered on his behalf; though this implication may be rebutted by circumstances.

In the case, also, of an executed consideration moved by a previous request(*a*), express or implied, the law will, in general, in the absence of any express promise, imply a promise by the contractor(*b*). There are, however, exceptions to this rule, the more important of which are as fol-

(*x*) See *Hicks* v. *Gregory*, 8 C. B. 378, 387; *Payne* v. *Wilson*, 7 B. & C. 423.

(*y*) See *Thorpe* v. *Thorpe*, 1 Ld. Raym. 662; *Graves* v. *Legg*, 9 Exch. 709.

Performance of conditions precedent may now be averred generally in pleading: Com. L. Proc. Act, s. 57. See *Bentley* v. *Dawes*, 9 Exch. 666.

(*z*) Ante, p. 313.

(*a*) The general rule, it will be remembered, is, that a past consideration will not support a subsequent promise, *unless moved by a previous request*, ante, p. 314; *Hayes* v. *Warren*, 2 Stra. 933.

(*b*) See *Nordenstrom* v. *Pitt*, 13 M. & W. 723; *Streeter* v. *Horlock*, 1 Bing. 31.

low:—1. Under the particular circumstances specified at p. 319, viz. where the plaintiff has voluntarily done that whereunto the defendant was legally compellable; for there, as already shewn, an express promise by the defendant is necessary, in order that an action against him may be sustainable for breach of contract 2. In the case of a barrister or a physician, who, although he may have acted at the request of the client or patient, will not, *without proof of an actual contract,* be entitled to sue him for services professionally rendered (*c*), the presumption of law being here against the existence of a contract for remuneration (*d*). 3. In the case of an infant who cannot bind himself except for necessaries, and whose express promise, unless made in writing after he comes of age, will not suffice to charge him. 4. In the case of a feme covert, whose contract, with some rare exceptions, is absolutely void (*e*). 5. In certain cases where the legal *remedy* is barred, although the *right* remains (*f*). Cases falling under one or other of the three latter of the classes just specified will be further alluded to in subsequent portions of this work.

Where the consideration, although past and executed, will support an action by reason of there having been an antecedent request, express or implied, it is a general and very important rule, that the consideration "*will support no other promise than such as would be implied by law*" (*g*).

Thus, where an account has been stated between parties,

(*c*) *Veitch* v. *Russell*, 3 Q. B. 928; *Hoggins* v. *Gordon*, Id. 466.

(*d*) Per *Coleridge*, J., 3 Q. B. 937.

(*e*) It will be almost superfluous to observe, that a contract void in its inception cannot be rendered valid by a subsequent express promise.

(*f*) Post.

(*g*) "According to the current of recent authorities, beginning with *Hopkins* v. *Logan*, infra, and ending with *Roscorla* v. *Thomas*, infra, where the consideration is past and executed, it will support only such a promise as the law will imply from that executed consideration." Judgment, 6 C. B. 174, and cases cited post.

and a balance ascertained to be due from one of them to the other, the law implies a promise by the debtor to pay *on request*, so that any ex post facto promise by him differing in its nature therefrom, ex. gr. to pay on a particular day named, would be *nudum pactum*, unless made upon a new consideration: If this were not so, there would, in truth, be "two co-existing promises on one consideration" (*h*)—a state of things manifestly incongruous and nonsensical.

The case of *Roscorla* v. *Thomas* (*i*) is usually cited with reference to the extent and nature of the promise which may be supported by an executed consideration: there the declaration (in assumpsit) stated, that, in consideration that plaintiff, at the request of defendant, *had bought* of defendant a horse at a certain price, defendant promised that the horse was *sound and free from vice*, &c., whereas he was not free from vice; after verdict for the plaintiff, it was objected, in arrest of judgment, that the precedent executed consideration was insufficient to support the subsequent alleged promise; and this objection was held fatal by the Court of Queen's Bench, for the promise must, as a general rule, be co-extensive with the consideration; but, "in the present case, the only promise that would result from the consideration as stated, and be co-extensive with it, would be to *deliver the horse upon request;*" and "the consideration stated would not raise an implied promise by the defendant that the horse was sound or free from vice." Lord *Denman*, C. J., after making the remarks above cited, proceeds to consider whether the consideration specified would support an *express* promise, and concludes, from the cases, that it would not; because, "a consideration past and

(*h*) *Hopkins* v. *Logan*, 5 M. & W. 241, 249.

(*i*) 3 Q. B. 234; *Kaye* v. *Dutton*, 7 M. & Gr. 807; *Atkinson* v. *Stephens*, 7 Exch. 572.

executed will support no other promise than such as would be implied by law."

A doubt may here possibly suggest itself, as to whether or not the doctrine above laid down has been in any way qualified or affected by the Com. Law Proc. Act. I apprehend that it has not, and that it would *now* be impossible to frame a declaration in assumpsit for *breach of warranty* upon facts identical with those in the case of *Roscorla* v. *Thomas*, just alluded to: the question in such case really would be—aye or no, did the defendant, at or before the time of sale, warrant the horse to be sound; if—the sale being completed—he were subsequently to make an affirmation as to the condition of the horse in terms amounting to a warranty, such affirmation could not, in any way, be made to relate back to and become incorporated with the previous transaction; and, if it should be viewed as an isolated promise, there would clearly be no consideration to support it (*k*).

Emmens v. *Elderton.*

The case of *Emmens* v. *Elderton* (*l*) will henceforth be regarded as a leading authority, with reference to the rule, that a past consideration will support no promise other than what the law would imply. There the action was brought by a solicitor against the secretary of an insurance company, the declaration stating, that "it was agreed by and between the plaintiff and the said company, that, from the 1st of January then next, the plaintiff, as the attorney and solicitor of the company, should receive and accept a salary of 100*l.* per annum in lieu of rendering an annual bill of costs for general business transacted by the plaintiff for the said

(*k*) See the form of declaration for breach of warranty of a horse, Com. L. Proc. Act, Sched. (B.), No. 21.

(*l*) 13 C. B. 495; *S.C.* 6 C. B. 160, 4 C. B. 479; *Lattimore* v. *Garrard*, 1 Exch. 809.

company as such attorney and solicitor, and should and would, for such salary of 100*l.* per annum, advise and act for the said company on all occasions in all matters (with certain specified exceptions) connected with the said company. That, the said agreement being so made, afterwards, "in consideration that the plaintiff had, at the request of the said company, promised the said company to perform and fulfil the same in all things on his part, the said company promised the plaintiff to perform and fulfil the same in all things on their part, *and to retain and employ him as such attorney and solicitor of the said company*, on the terms aforesaid." The breach alleged was, that the company did not nor would continue to retain or employ the plaintiff as their solicitor on the terms stated, but wrongfully and without reasonable cause dismissed him. The technical question which arose upon the count of the declaration above set out, and which was discussed successively in the Court of Common Pleas, in the Exchequer Chamber, and in the House of Lords, was, whether the alleged promise to retain and employ was to be implied from the agreement stated, or whether it did not, in some measure, *enlarge* the general promise to perform that agreement, so as to be nudum pactum, unless supported by some new consideration.

"If," said *Crompton*, J., delivering his opinion in regard to the validity of the declaration to the House of Lords, "the agreement itself contains this same promise to retain and employ as such attorney on the terms aforesaid, then these words, being surplusage, will not prejudice the count, and must be taken as merely pointing the promise to the breach afterwards assigned, for ceasing to retain and employ."

"If, on the other hand, the words in question at all en-

large the previous agreement by binding the company to retain the plaintiff in any manner in which the agreement did not bind them, as by binding the company to find him any particular work, or to keep him in work, or to employ him in any of the business which he was not to do for the 100*l.* per annum, or to continue him in the employment for any time for which they were not bound by the agreement,—the count will be bad for want of a consideration to support this additional promise."

Such being the precise questions for decision in *Emmens* v. *Elderton*, the majority of the Judges held, and in conformity with their opinion the House of Lords determined, that the former of the two views above suggested, with reference to the legal meaning of the words used in the declaration, was correct, and that the declaration itself was consequently good. The promise to "retain and employ" being restricted and limited by the terms of the agreement therein previously set out as having been made between the parties.

But, although it is generally true, as above stated, that 'a consideration' past and executed will support only such a promise as the law will imply therefrom (*n*), that strict rule has, in certain cases, been departed from, and the Courts have held, that, where the consideration for a promise was originally beneficial to the party promising, yet, if he be protected from liability by some provision of the statute or common law meant for his advantage, he may renounce the benefit of that law; and, if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by the law to perform it (*o*).

(*n*) Ante, p. 332.

(*o*) Judgment, *Earle* v. *Oliver*, 2 Exch. 90, citing note to *Wennall* v. *Abney*, 3 B. & P. 252.

As exemplifying the qualification just stated of the general rule, let us take the case of a debt barred by the Statute of Limitations. A debt so barred, says *Parke*, B.(*p*), is unquestionably a sufficient consideration for every promise, absolute or unqualified, qualified or conditional, to pay it. Promises to pay a debt simply or by instalments, or when the party is able, are all equally supported by the past consideration, and, when the debt has become payable instanter, may be given in evidence to support an indebitatus count in the declaration for its recovery. So, when the debt is not already barred by the statute, a promise to pay the creditor will revive it, and make it a new debt; and a promise to an executor to pay a debt due to his testator creates a new debt to him. But although an express promise revives the debt in any of the cases just mentioned, it must not thence be inferred that the debt will be a sufficient consideration to support a promise to do a *collateral* thing—as to supply goods, or to perform work and labour(*p*). In such case, the promise would be but an accord unexecuted, and no action would lie for not executing it(*q*).

Moral consideration.

One class of cases, viz. where there has been a *moral* consideration for a subsequent express promise, must here be specially noticed, because it was at one time thought that the obligation thus created might sustain and render binding a subsequent express promise; but this doctrine seems to have been shaken by *Littlefield* v. *Shee*(*r*); and has been definitively exploded in *Eastwood* v. *Kenyon*(*s*) and *Beaumont* v. *Reeve*(*t*), where Lord *Denman* states the

(*p*) See *Reeves* v. *Hearne*, 1 M. & W. 323.

(*q*) Judgment, 2 Exch. 90.

(*r*) 2 B. & Ad. 811.

(*s*) 11 Ad. & E. 438.

(*t*) 8 Q. B. 483; recognised in *Fisher* v. *Bridges*, 3 E. & B. 642, reversing judgment in *S. C.* 2 E. & B. 118; Leg. Max. 2nd ed., p. 589.

result of the cases to be, that "an express promise cannot be supported by a consideration from which the law could not imply a promise," save only in certain cases which he specifies.

The doctrine now accordingly established upon the point in question may be supported by reasoning such as Dr. Story urges in his Treatise on Bailments(*u*): "There are," says that eminent jurist, "many rights and duties of moral obligation which the common law does not even attempt to enforce. It deems them of imperfect obligation, and therefore leaves them to the conscience of the individual. And, in a practical sense, there is wisdom in this course; for judicial tribunals would otherwise be overwhelmed with litigation, or would become scenes of the sharpest conflict upon questions of casuistry and conscience."

From what has been just said, it follows that the mere moral obligation on a father to maintain his child affords no inference of a legal promise to pay his debts; so that, "if a father turns his son upon the world, the son's only resource, in the absence of anything to shew a contract on the father's part, is to apply to the parish, and then the proper steps will be taken to enforce the performance of the parent's legal duty"(*x*). If, indeed, a father does any specific act, from which it may reasonably be inferred that he has authorised his son to contract a debt, he may be liable in respect of the debt so contracted(*y*). But the law

(*u*) 5th ed., p. 183.

(*x*) Per *Jervis*, C. J., *Shelton* v. *Springett*, 11 C. B. 455. Per Lord *Abinger*, C. B., *Mortimore* v. *Wright*, 6 M. & W. 482. A promise to the plaintiff (an unmarried woman), that, if she will abstain from affiliating a child, the defendant will pay for its maintenance, is founded on good legal consideration: *Linnegar* v. *Hodd*, 5 C. B. 437; *Jennings* v. *Brown*, 9 M. & W. 496. See *Crowhurst* v. *Laverack*, 8 Exch. 208; ante, p. 322; *Cooper* v. *Parker*, 14 C. B. 118.

(*y*) Per Lord *Abinger*, C. B., *Mortimore* v. *Wright*, supra.

does not authorise a son to bind his father by his contracts (*z*).

Although, when strictly and technically examined, a simple contract may doubtless be analysed as in the preceding pages, and, if thus analysed, will be found, as there stated, to consist of a request, a consideration, and a promise; yet so minute and critical an inquiry into its elements is not in very many cases needed, preliminary to adjudicating in an action founded upon it. The truth of this remark will sufficiently appear from what has been already said relative to implied contracts, promises, and requests (*a*). And we should also remember that in very many cases no question at all is raised as to the fact of *some* contract having been entered into between the parties, the sole issue at the trial having reference to the precise terms and nature of such contract. The same facts will, moreover, frequently serve to evidence either an executed or an executory contract, at the option of the pleader (*b*), according as they are regarded by him a priori or ex post facto.

It sometimes happens, also, that a consideration, which at first sight appears to have been past at the time of the alleged promise, and therefore insufficient to support it, is found on examination to have been in truth concurrent, and consequently unexceptionable. In *Steele* v. *Hoc* (*c*), the Court of Queen's Bench take occasion to observe, that "The expression that a promise is founded upon a consideration conveys the notion that the consideration precedes the promise in the mind of the party making the promise;

(*z*) Per *Maule*, J., 11 C B. 456.

(*a*) Ante, pp. 313 et seq.

(*b*) See *Payne* v. *Wilson*, 7 B. & Cr. 423; *Streeter* v. *Horlock*, 1 Bing. 34; *Staines* v. *Wainwright*, 6 Bing. N. C. 174.

(*c*) 14 Q. B. 431, 445.

he promises because the consideration exists; and this form of expression is shewn by the authorities to have been frequently used when the consideration and the promise are concurrent. Each side of a contract is consideration or promise according to the party speaking of it; and if each party were to put into writing his own promise, each side of the contract would in turn appear to have preceded the other, though both formed one agreement." When the words of an agreement in their ordinary acceptation are thus capable of expressing either a past or a concurrent consideration, and where upon one construction the instrument would be void, the other construction is to be adopted which makes it valid (*d*), *ut res magis valeat quam pereat.*

We thus see that various reasons may be adduced explanatory of what has been above said, viz. that any minute analysis, such as has been heretofore submitted, of a simple contract is, in very many cases which occur to the practitioner, wholly unnecessary. And if, furthermore, we call to mind that the common indebitatus counts will alone suffice in the great majority of cases which might be instanced as giving rise to actions of assumpsit or of debt on simple contract, we shall readily see why it is that questions involving distinctions so nice and subtle as those which have been latterly under discussion comparatively seldom present themselves for judicial notice or inquiry.

Some rules of general application relating to contracts—special or simple.

Having in the previous pages characterized and classified according to their rank the various kinds of contracts—having successively adverted to contracts of record—to special and to simple contracts, I propose to consider briefly some few rules of general and extensive application, which

(*d*) Judgment, *Steele* v. *Hoe*, 14 Q. B. 445; *Thornton* v. *Jenyns*, 1 M. & Gr. 166, 188–9.

influence our Courts in adjudicating upon them, and which may with truth be said to have a direct and important bearing upon even the most ordinary dealings between man and man.

Effect of fraud on contracts.

Now, with reference to contracts, of whatsoever kind they be, the primary rule is that good faith must be observed between the contracting parties—*ex dolo malo non oritur actio* (*e*).—"No contract" says *Patteson*, J., (*f*) "can arise out of a fraud, (i. e. unless the party upon whom such fraud was practised chooses to accept and ratify the contract (*g*),) and an action brought upon a supposed contract which is shewn to have arisen from fraud may be resisted." It might indeed be impossible to give a definition of what constitutes fraud so as to meet all the various combinations of circumstances to which that word would apply; but there can be no difficulty in saying, that "whenever any one has by wilful misrepresentation induced another to part with his rights on the belief that such representation was true," this is, in the plainest and most obvious sense, a fraud which a Court of justice will not tolerate (*h*). The terms explanatory of what fraud is, here used, being very general, may, it is conceived, be so understood as to include any case

(*e*) To the remarks upon this maxim in Leg. Max., 2nd ed., pp. 571 et seq., the reader is referred for additional information as to the subject touched upon in the text.

(*f*) *Campbell* v. *Fleming*, 1 Ad. & E. 42; *Jones* v. *Yates*, 9 B. & Cr. 532, 539.

(*g*) See *White* v. *Garden*, 10 C. B. 919, 927, where *Talfourd*, J., says, "A contract for the sale of goods, though obtained by fraud, is perfectly good, if the party defrauded thinks fit to ratify it." In *Stevenson* v. *Newnham*, 13 C. B. 285, 303, the Court observe, "It must be considered as established, that fraud only gives a right to avoid a contract or purchase." And see the cases cited Ib.; Per *Parke*, B., *Murray* v. *Mann*, 2 Exch. 541.

(*h*) Per Lord *Cranworth*, *Reynell* v. *Sprye*, 1 De G., M. & G. 691. See *Curson* v. *Belworthy*, 3 H. L. Cas. 742. For a definition of fraud, consult also Richardson Dict. and Roget Thesaur., ad verb.

involving it which can readily be suggested—whether the contract in question be executed or executory—special or simple.

On the ground of fraud, artifice, or deceit, as we have already seen (*i*), the judgment of a Court of law may be set aside (*k*), and a deed although duly executed may be successfully impugned; a fortiori, then, may fraud be alleged to nullify a contract not under seal, or with a view to compelling the restitution of property transferred or money paid in pursuance of it. "A person," it has been said, "who is induced to part with his property on a fraudulent contract, may, on discovering the fraud, avoid the contract, and claim a return of what has been advanced upon it. Fraud destroys the contract *ab initio*, and the fraudulent purchaser has no title. But if the party defrauded would disaffirm the contract, he must do so at the earliest practicable moment after discovery of the cheat. That is the time to make his election, and it must be done promptly and unreservedly. He must not hesitate, nor can he be allowed to deal with the subject-matter of the contract and afterwards rescind it. The election is with him, he may affirm or disaffirm the contract, but he cannot do both; and if he concludes to abide by it as upon the whole advantageous, he shall not afterwards be permitted to question its validity" (*l*).

A few cases shall presently be cited in illustration of the remark that fraud will vitiate and avoid a simple contract. I would, however, first observe that a distinction undeniably exists between *moral* and *legal* fraud; that there are many kinds of moral fraud which clearly could not be made available, either as ground of action or by way

Moral and legal fraud.

(*i*) Ante, pp. 272, 288.

(*k*) See *Bowen* v. *Evans*, 2 H. L. Cas. 257; *Shedden* v. *Patrick*, (in Dom. Proc.), May, 1854.

(*l*) *Masson* v. *Bovet*, 1 Denio (U. S.) R. 73–4; *Campbell* v. *Fleming*, 1 Ad & E. 40.

of defence before a Court of law. Thus a vendor is entitled to sell for the best price he can get, and is not in any way liable at law for a simple commendation of his own goods, however worthless they may be, provided he has not made any false statement as to their quality or condition, nor asserted anything respecting them which may amount to a warranty in legal contemplation (*m*). It has even been held, that the vendor of a chattel, in which there is a patent defect which greatly diminishes its value, will not incur liability by silence with regard to it (*n*); and if A. treats with B. for the purchase of an estate knowing that there is a valuable mine under it, and B. makes no inquiry, there is authority to shew that A. is not bound either at law or in equity to give information as to the existence of the mine (*o*). Now, in any of the cases here suggested, although the moralist might possibly condemn, our law would decline to give redress. *Non omne quod licet honestum est* (*p*).

As on the one hand there may thus be an intention to mislead, or even an attempt to induce a person unknowingly to sacrifice his own interest, without fraud in law; so, on the other hand, legal fraud may exist, without any *serious* amount of moral turpitude. "The cases," says *Parke*, B., in *Murray* v. *Mann* (*q*), "shew a distinction between legal and moral fraud. For instance, where a person purports to accept a bill of exchange by procuration, when in fact he has no such authority, that has been held (*r*) a legal fraud, rendering the party liable to an action of deceit," although the jury negatived the existence of fraud.

As to the sufficiency of 'legal' fraud to support an action,

(*m*) Leg. Max. 2nd ed. 615, and cases there cited.

(*n*) Leg. Max. 2nd ed. 609, 617.

(*o*) Per Lord *Eldon*, *Turner* v. *Harvey*, Jac. 178.

(*p*) D. 50. 17. 144.

(*q*) 2 Exch. 538, 541.

(*r*) *Polhill* v. *Walter*, 3 B. & Ad. 114. See *Thom* v. *Bigland*, 8 Exch. 725, 729.

when unaccompanied by *any* degree of 'moral' fraud, judicial opinions have conflicted. A principal, it has been urged, may in many cases be responsible for the fraud of his agent, although quite innocent in a moral point of view. "Whether," remarks Lord *Lyndhurst*, in *Attwood* v. *Small* (*s*), "a particular representation be made by the principal, or by the agent whom he employs for the purpose of the contract, is wholly immaterial. If the agent acts fraudulently, even without the knowledge of the principal, what is that to the party contracting? The contract is vitiated." And again, according to the opinion of Lord *Abinger*, C. B., in *Cornfoot* v. *Fowke* (*t*), "it is not correct to suppose, that the legal definition of fraud and covin necessarily includes any degree of moral turpitude. Every action for the breach of a promise—for deceit—for not complying with a warranty, or for a false representation, is founded upon a legal fraud, which is charged as such in the declaration, although there be no moral guilt in the defendant. The warranty of a fact which does not exist, or the representation of a material fact contrary to the truth, are both said, in the language of the law, to be fraudulent, although the party making them suppose them to be correct."

The weight of authority, however, is clearly against the views propounded by the eminent individual last named. "It is settled law," says *Parke*, B., in *Thom* v. *Bigland* (*u*), "that, independently of duty (*x*), no action will lie for a

(*s*) 6 Cl. & F. 413. And see, per Lord *Campbell*, 1 H. L. Cas. 615. His Lordship there says, "In an action upon contract, the representation of an agent is the representation of the principal; but, in an action on the case for deceit, the misrepresentation or concealment must be proved against the principal." See also, per *Pollock*, C. B., *Atkinson* v. *Pocock*, 1 Exch. 796, cited arg. 6 C. B. 322. Per *Rolfe*, B., 6 M. & W. 370.

(*t*) 6 M. & W. 358; and in *Moens* v. *Heyworth*, 10 M. & W. 155.

(*u*) 8 Exch. 731.

(*x*) Post, Bk. III.

misrepresentation, unless the party making it knows it to be untrue, and makes it with a fraudulent intention to induce another to act on the faith of it, and to alter his position, to his damage. This appears from the cases of *Evans* v. *Collins* (*y*), and *Ormrod* v. *Huth* (*z*), which have perfectly settled the law on that point."

In *Wilde* v. *Gibson* (*a*), it was contended, that an action of deceit might be maintained, without proof of actual fraud; but Lord *Campbell* answered, "From that position I entirely dissent. If you mean by 'fraud,' an intention to injure the party to whom the representation is made, or to benefit the party who makes the representation, there may be an action of deceit without fraud; but there must be falsehood: there must be an assertion of that which the party making it knows to be untrue; the scienter must either be expressly alleged, or there must be an allegation that is tantamount to the scienter of the fraudulent representation, and this allegation must be proved at the trial" (*b*); and his Lordship adds, "If that falsehood is stated, without any view of benefiting the person who states the falsehood, or of injuring the person to whom the falsehood is stated, in one sense of the word you may say it is not fraudulent, but it is a breach of a moral obligation; it is telling a lie; *and if a lie is told, whereby a third person is prejudiced,* although there may be no profit to the person who tells it, and although no injury was intended to the party to whom it is told, but a benefit to a third person, *it is clearly a breach of moral obligation,* and is a fraud which will support an action of deceit." The proposition here printed in italics

(*y*) 5 Q. B. 820.
(*z*) 14 M. & W. 651.
(*a*) 1 H. L. Cas. 605, 633.
(*b*) Citing *Foster* v. *Charles*, 7 Bing. 106; *Polhill* v. *Walter*, 3 B. & Ad. 123; *Corbett* v. *Brown*, 8 Bing. 37.

seems to be altogether unimpeachable, and indicates the nature of the fallacy into which those have fallen, who contend that legal fraud may exist without any admixture whatever of "moral turpitude."

Additional authorities might readily be cited in support of the view here advocated. In *Taylor* v. *Ashton* (c), *Parke*, B., distinctly states his adhesion to the doctrine, that "an action for deceit will not lie, without proof of moral fraud;" and he further observes, that "there may undoubtedly be a fraudulent representation, if made dishonestly, of that which the party does not know to be untrue, if he does not know it to be true." Further, in delivering their judgment in the case just cited, the Court of Exchequer lay down, that in an action for false representation, and damage resulting therefrom, it is not necessary to shew that the defendant knew the fact affirmed by him to be untrue; if he stated a fact which was untrue for a fraudulent purpose, he at the same time not believing that fact to be true, there would, under such circumstances, be both a legal and a moral fraud (d).

In connexion with the subject just discussed, it is worthy of notice, that a very learned Judge, in a recent case, thus expresses himself, "I conceive, that, if a man, having no knowledge whatever on the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril; and if it be done, either with a view to secure some benefit to himself or to deceive a third person, he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts. Although the person making the representation may have no knowledge of its falsehood, the representation may still

(c) 11 M. & W. 401. (d) Judgm. 11 M. & W. 415.

have been fraudulently made"(*e*). In the case here put, it would be impossible successfully to contend that no element of moral fraud presents itself.

But, although it be conceded that moral may exist without legal fraud, and that there may be legal fraud without any great or serious amount of moral delinquency, there can be no doubt, that, in the vast majority of cases involving fraud, trickery, or covin, which come under the cognisance of Courts of justice, no questions have to be discussed respecting the distinctions—sometimes rather fine and unsatisfactory—to which I have just adverted. Fraud, it must however be observed, is not actionable nor available by way of defence to an action, unless, in the one case, it has occasioned damage to the complainant, or, in the other, has induced the defendant to contract. A bare lie, for instance, albeit told with an intent to injure, would not, if unproductive of damage, lay the foundation of an action (*f*), nor would a misrepresentation, however corruptly made, afford a good defence to an action founded upon contract, unless it were shewn to have operated as an inducement to the defendant to enter into the alleged contract.

The test proposed by Lord *Brougham* in the important case of *Attwood* v. *Small* (*g*), seems to be the most accurate and practically useful which can be given in reference to one large and important class of frauds—those, viz. which are evidenced by misrepresentations and misstatements. In order to constitute such fraud, it is there said, three circumstances must combine, it must appear, first, that the repre-

(*e*) Per *Maule*, J., *Evans* v. *Edmonds*, 13 C. B. 786. See per *Cresswell*, J., and *Wilde*, C. J., 6 C. B. 322; Per *Alderson*, B., *Moens* v. *Heyworth*, 10 M. & W. 158.

(*f*) Judgm. *Langridge* v. *Levy*, 2 M. & W. 531; Per *Buller*, J., 3 T. R. 56.

(*g*) 6 Cla. & F. 444; *Burnes* v. *Purnell*, 2 H. L. Cas. 529 et seq. *Moens* v. *Heyworth*, 10 M. & W. 147; *Pasley* v. *Freeman*, 1 Smith L. C. 55, and note thereto.

sentation was contrary to the fact; secondly, that the party making it knew it to be contrary to the fact; and thirdly, and chiefly, that it was the false representation which gave rise to the contracting of the other party—there must be *dolus dans locum contractui*, i. e. not merely a fraudulent attempt at overreaching, but an attempt so far successful as to have operated as an inducement to the other party to contract. "We consider it clear law," says the Court of Queen's Bench in *Gerhard* v. *Bates*(*h*), "that, if A. fraudulently makes a representation which is false, and which he knows to be false, to B., meaning that B. shall act upon it, and B. believing it to be true does act upon it, and thereby suffers a damage, B. may maintain an action on the case against A. for the deceit, there being here the conjunction of wrong and loss(*i*), entitling the injured and suffering party to a compensation for damages."

When the conditions thus indicated are fulfilled, there can be no doubt, that, according as the party on whom fraud has been practised is plaintiff or defendant, he may rely upon it as ground of action or as matter of defence against the party who has practised it; and in illustration of this remark the cases below cited may be consulted(*k*).

It may perhaps be not altogether out of place to add, whilst upon this subject, that an injury may be caused by an act primâ facie savouring of false representation for which an action will not lie, on the ground that no element of fraud, either legal or moral, in fact, enters into it.

(*h*) 2 E. & B. 488, citing Com. Dig. "Action upon the Case for a Deceit," (A. 9, 10).

(*i*) As to injuria cum damno, ante, p. 106.

(*k*) *Jarrett* v. *Kennedy*, 6 C. B. 319; *Wontner* v. *Shairp*, 4 C. B. 404; *Murray* v. *Mann*, 2 Exch. 538; *Vane* v. *Cobbold*, 1 Exch. 798; *Cornfoot* v. *Fowke*, 6 M. & W. 358; *Pilmore* v. *Hood*, 5 Bing. N. C. 97, 109. See *Atkinson* v. *Pocock*, 1 Exch. 796; *Southall* v. *Rigg*, 11 C. B. 481; Per Lord *Denman*, C. J., *Wright* v. *Crookes*, 1 Sc. N. R. 698; *Connop* v. *Levy*, 11 Q. B. 769; *Spencer* v. *Handley*, 4 M. & Gr. 414.

"If," remark the Court of Queen's Bench in *Barley* v. *Walford*(*l*), "every untrue statement which produces damage to another would found an action at law, a man might sue his neighbour for any mode of communicating erroneous information—such (for example) as having a conspicuous clock too slow—since plaintiff might be thereby prevented from attending to some duty or acquiring some benefit." A doctrine calculated to create legal responsibility so wide in cases where blame cannot really attach to any one must, they further observe, be restrained within some limits. "If, indeed, the defendant were under any *legal obligation*(*m*) to state the truth correctly to the plaintiff, there would be a grievance in misleading him, for which an action on the case would lie; still more so, if he made the false representation with a view to some unfair advantage to himself"(*n*).

It will have been noticed, that, in the course of the preceding pages, I have had occasion repeatedly to specify an action on the case as the appropriate remedy for deceit or fraud productive of damage. Reference to this peculiar form of action will have, at greater length, to be made in the third Book of this work, treating of Wrongs and Remedies ex Delicto; a question of some interest here, however, demands a brief digression, viz. whether, in an action strictly founded upon contract, the *motive*, which may have influenced the defendant, can properly be investigated. The result of this inquiry will shew us why it is that case is the proper civil remedy for fraud and covin.

Now, the breach of a contract, express or implied, exe cuted or executory, per se, vests a right of action in the contractee, on the assumption, that is, that he has himself done every thing which it was incumbent on him to do towards or for the behoof of the other contracting party; this being

(*l*) 9 Q. B. 197, 208. (*m*) Post, Bk. III. (*n*) Judgm. 9 Q. B. 208.

so, it can, as a general rule, be in no way material to make any inquiry as to the *motive* which may have prompted the contractor to his breach of contract. If A. covenants with B. to do or not to do a particular thing, and A. commits a breach of this covenant, he will, ipso facto, incur liability to B. for all damage resulting directly from the breach; and whilst, on the one hand, the excellence of his motive in doing or omitting to do the particular act cannot be allowed to avail him, so, on the other hand, any inquiry as to the existence of a malicious or fraudulent intention on his part to injure the covenantee, would, in an action founded on the breach of covenant, be wholly irrelevant. So, again, if goods supplied by A. to B., in pursuance of a contract of sale, prove to be inferior in quality, or do not correspond with the sample, A. will be liable, in an action of assumpsit, to make good the loss sustained, albeit he never even saw the specific goods supplied, and was ignorant of their condition or quality. Where an action 'sounds in contract,' then, the motive or *animus* of the defendant is "to be entirely disregarded, and the damages are strictly" to be "limited to the direct pecuniary loss resulting from the breach of the agreement in question" (*o*).

Such is no doubt the general rule with reference to actions ex contractu; the rule there applies to restrict the parties at Nisi Prius to the production of evidence touching the breach of contract alleged in the declaration. Proof of fraud being excluded, the parties are limited to the discussion of the issue actually raised on the record. "No form of action," it has been observed (*p*), "has yet been devised for the *fraudulent breach* of an agreement." But in this

(*o*) Sedgw. Dam. 2nd edit. 204. It is sufficient in this place to state the general principle applicable in actions founded upon contract. Some modifications of this principle will hereafter be specified.

(*p*) Sedgw. Dam. 2nd edit. 206.

case the complainant should, according to ordinary precedents, frame his declaration, either on the breach of contract or on the fraud(*q*), unless indeed, as in *Gerhard* v. *Bates*(*r*), he think it desirable to combine with a count founded upon contract one framed in tort, so as to meet either view of the case which may be established at the trial. In the great majority of cases, then, a charge of fraud cannot with propriety be introduced into a count founded upon contract. Neither can evidence of the defendant's fraud be ordinarily relevant in support of the plaintiff's case, save indeed where the action is brought to recover back money paid, on the express ground that the plaintiff was fraudulently induced to part with it, and has received no consideration for it. In such cases, however, proof of fraud is in truth given by way of answer to some defence anticipated from the other side, and does not in strictness itself furnish the gist and foundation of the action. Thus, if the action be for money had and received, or to recover back a deposit paid in consequence of some fraudulent statement put forth by the defendant as director of a projected company, the plaintiff here founds his right to recover upon the total failure of the consideration on which the payment was made(*s*); he has, however, to meet the objection that the money in question was not "had and received to his (the plaintiff's) use," but was to be applied according to some express understanding

(*q*) An allegation of falsehood and fraud, improperly introduced, may, however, be struck out of a declaration, provided a good cause of action is still apparent therein—per *Parke*, B., 8 Exch. 730. See *Hopkins* v. *Tanqueray*, 23 L. J., C. P., 162, cited post, p. 355.

In cases of insurance any material misstatement or concealment vitiates the contract; and whether it be fraudulently made or not is wholly immaterial, except with reference to the return of the premium: *Anderson* v. *Thornton*, 8 Exch. 425, 427.

(*r*) 2 E. & B. 476, cited ante, p. 328.

(*s*) *Walstab* v. *Spottiswoode*, 15 M. & W. 501.

between the defendant and himself, (usually evidenced by the subscriber's agreement or deed of settlement of the company)—that the money was in fact received upon certain specific trusts, which either have been faithfully executed, or will hereafter be executed, pursuant to their terms. Anticipating this line of defence, the plaintiff meets it, if he can, by proof of fraud operating as an inducement to the execution of the deed, or to the signing of the agreement, and therefore invalidating it, and, perhaps, also operating as an inducement to the payment of the deposit money. Many cases of this kind, offering instances in great variety of circumstantial fraud, are to be found in our Reports, of which *Wontner* v. *Shairp* (*t*) is the leading authority.

Without pursuing the digression which has been here ventured on, we may, I think, conclude that fraud can only come collaterally under notice in an action for breach of contract—that an action 'sounding in tort' is the proper form of remedy for covin and deceit.

Great care is often requisite in discriminating accurately between three classes of cases:—1. Where fraud is involved. 2. Where a warranty has been given. 3. Where a representation or statement has been made, erroneous indeed, but neither fraudulent nor incorporated with the contract. As to the first of these three classes enough has been already said (*u*); it remains, therefore, to distinguish—1st, breach of warranty from fraud; and, 2ndly, a mere representation from a warranty.

Distinction between breach of warranty and fraud.

1st. By way of illustration, let us take the case of a sale of goods, and we shall at once see that the distinction

(*t*) 4 C. B. 404; with which compare *Watts* v. *Salter*, 10 C. B. 477. See also *Mowatt* v. *Lord Londesborough*, 3 E. & B. 307; *Ward* v. *Lord Londesborough*, 12 C. B. 252; and cases cited, Broom's Pract. vol. 1, pp. 416—420.

(*u*) See also the remarks, post, pp. 356-7.

between a warranty that a personal chattel is sound and a fraud in the sale of it is broad and manifest(*v*).

If a man sell a horse to another, and expressly warrant him to be sound, the contract is broken if the horse prove otherwise. The purchaser in such case relies upon the contract; and it is immaterial to him whether the vendor did or did not know of the unsoundness of the horse. In either case he is entitled to recover all the damages which he has sustained by reason of the breach of that contract. "A warranty," says Lord *Mansfield*(*x*) "extends to all faults known and unknown to the seller."

Again, if the vendor say to the purchaser, 'I do not know whether the horse is or is not sound, and therefore will not warrant him; all I can say is, that I have long owned him, and know of no unsoundness;' here manifestly is no warranty, and, if the vendor spoke the truth, no fraud. If, however, the vendee can shew that the horse was unsound, that the vendor knew it to be so at the time of the sale, and that in consequence of the false representations made by him, the purchaser was defrauded, the vendor would be liable, not for a breach of a contract of warranty, for he made no such contract, but for making representations which he knew to be false. In such case the guilty knowledge of the vendor would constitute an essential ingredient in the fraud, and in an action against him should be both alleged and proved.

To entitle the vendee to recover under such circumstances, his action must be founded not upon a breach of a contract of warranty, but upon the fraud practised by the

(*v*) The remarks ensuing in the text are extracted from the judgment of *Waite*, J., *Bartholomew* v. *Bushnell*, 20 Day (U. S.) R. 275-6.

(*x*) *Stuart* v. *Wilkins*, 1 Dougl. 20. Per Lord *Brougham* 6 Cla. & F. 444.

vendor, or, at least, there should be a count adapted to a charge of that nature (*y*).

In the case just put by way of illustration, the warranty (if any) is supposed to be *express*. Equally obvious, however, is the distinction between fraud and the breach of an *implied* warranty. A warranty may be implied from the course and mode of dealing between parties. If A. orders B., a tradesman, to make an article well known in the trade, and of which the use is understood, B., on supplying it, must be presumed to mean and undertake that it shall be reasonably fit for the particular purpose for which he knew that it was intended (*z*). In this case the party who impliedly warrants will be bound by his warranty, and liable for a breach of it, without proof of fraud or of the scienter.

Distinction between warranty and representation.

The distinction between a warranty and a representation is sometimes rather fine. There is no doubt that a representation intended by the vendor as a warranty, and acted on as such by the vendee, amounts in law to a warranty; and it is also well settled that such representation so operates, although made during the treaty for a sale, and some days before the sale was finally agreed upon, if it appear that it was not withdrawn, and provided the contract of sale does not exclude it by its terms. When, however, negotiations have actually terminated in a written contract, the parties

(*y*) Per *Waite*, J., 20 Day (U. S.) R. 275-6.

(*z*) *Shepherd* v. *Pybus*, 3 M. & Gr. 868; *Ollivant* v. *Bayley*, 5 Q. B. 288; *Brown* v. *Edgington*, 2 M. & Gr. 279; *Burnby* v. *Bollett*, 16 M. & W. 644. Generally, as to what is a warranty, see *Cranston* v. *Marshall*, 5 Exch. 395; *Taylor* v. *Bullen*, Id. 779; *Chandelor* v. *Lopus*, 1 Smith L. C. 77, and note thereto. *Dawson* v. *Collis*, 10 C. B. 523, shews, that the purchaser of goods by sample, with a warranty that they are equal to sample, must either bring a cross action for breach of warranty, or rely on the non-correspondence of the bulk with the sample as a ground for reducing the damages: he cannot, it seems, refuse to receive the goods. As to implied warranty, see also *Chanter* v. *Hopkins*, 4 M. & W. 399.

thereby tacitly affirm that such writing contains the whole contract between them, and no new terms are allowed to be added to it by extraneous evidence (*a*).

So where the contract between parties has not been reduced into writing, the tests for determining whether a statement made by one of them does or does not amount to a warranty will be: was it made pending the contract? was it intended, and reasonably and bonâ fide accepted, as a warranty?

In *Hopkins* v. *Tanqueray* (*b*), the declaration stated that the defendant, by falsely and fraudulently representing and warranting a horse to be then sound, sold it to the plaintiff; yet the said horse was not then sound, as the defendant then knew, &c. There was no evidence offered of fraud, but the facts proved were these—the defendant, having sent a horse to Tattersall's to be sold by auction, went into the stable where it was on the day before the sale, and there found the plaintiff, with whom he had been previously acquainted, examining the horse's legs; upon which the defendant said, "You have nothing to look for; I assure you he is perfectly sound in every respect:" to this the plaintiff replied, "If you say so, I am satisfied," and he desisted from his examination. On the next day the horse was put up for sale by public auction without a warranty, and the plaintiff purchased him for 280 guineas, having, as he stated, 'made up his mind to buy the horse, relying on the defendant's positive assurance that he was sound.' The horse subsequently turned out to be unsound; and the plaintiff, having re-sold him for less than he had given for him, sued the defendant for the loss and damage thus sustained. After verdict for the plaintiff, the question raised for the decision

(*a*) See *Randall* v. *Rhodes*, 1 Curtis (U. S.) R. 92. (*b*) 23 L. J. (C. P.) 162.

of the Court in banc, on motion for a nonsuit, was whether there was any evidence from which the jury could infer a warranty. The Court held that there was not—that what was said before the sale amounted to a representation only, and not to a warranty; and that the defendant could not be liable for a mere representation, although contrary to the fact, unless it were fraudulently made.

A mere expression of opinion then, or of intention (*c*), will not be deemed tantamount to a warranty: and, further, in order to be operative as such, the representation relied upon must be shewn to have been made *pending the contract* (*d*).

Where a mis-statement has been made *anterior* to the completion of the contract, the question for consideration will be:—Is there evidence of *dolus dans locum contractui* (*e*)? Upon this point, the remarks of Lord *Langdale*, M. R., in *Clapham* v. *Shillito* (*f*), claim attention. Their purport is to shew, that cases frequently occur, in which, upon entering into contracts, misrepresentations made by one party have not been in any degree relied on by the other party. If the party to whom the representations were made himself resorted to the proper means of verification before he entered into the contract, it may appear that he relied upon the result of his own investigation, and not upon the statements made to him on the other side; or, if the means of investigation and verification were at hand, and the attention of the party receiving the representations were drawn to them, the circumstances of the case may lead

(*c*) *Benham* v. *United Guarantee &c. Co.*, 7 Exch. 744.

(*d*) Per *Maule*, J., *Hopkins* v. *Tanqueray*, ante. See further as to the distinction between a representation and a warranty, 2 Wms. Saunds. 200 c.

(*e*) Ante, p. 348.

(*f*) 7 Beav. 149. See *Harris* v. *Kemble*, 2 Dow & Cl. 463.

a jury to impute to the party alleged to have been misled such a knowledge of the facts as upon due inquiry he ought to have obtained, the notion of any reliance having been placed on the representations made to him being necessarily excluded.

Again, in endeavouring to ascertain what reliance was placed on representations, they should be considered with reference to the subject-matter which they concern, and the relative knowledge of the parties. If the subject is capable of being accurately known, and one party is or is supposed to be possessed of accurate knowledge, and the other is entirely ignorant, and a contract is entered into after representations made by the party who knows or is supposed to know, without any means of verification being resorted to by the other, it may well enough be presumed, that the ignorant man relied on the statements made by him who was supposed to be better informed; but, if the subject is in its nature uncertain,—if all that is known about it is matter of inference from something else, and if the parties making and receiving representations on the subject have equal knowledge and means of acquiring knowledge, and equal skill, it is not easy to presume that representations made by one would have much or any influence on the other (*g*). The remarks here made will serve to shew, not only the mode in which a Court of equity will distinguish between fraud and mere mis-statement, but likewise how the evidence in the class of cases here alluded to should be analysed in a Court of law (*h*).

Of contracts illegal – opposed to public policy – immoral.

Passing on to a brief notice of contracts and considerations which are illegal—as being in violation of positive law,

(*g*) Per Lord *Langdale*, M. R., *Clapham* v. *Shillito*, 7 Beav. 149, 150.

(*h*) *Attwood* v. *Small*, 6 Cla. & F. 232, is the leading case upon the subject adverted to in the text.

or opposed to public policy, or immoral, I must repeat (*i*), that the remarks which follow will be found generally applicable as well to Special as to Simple Contracts. As regards the former of these, the L. J. *Knight Bruce* observes, in a recent case (*j*), that, "Notwithstanding the solemnity and force which the law ascribes to deeds, and all the strictness with which, in general, it prohibits the introduction of extrinsic evidence to prove that an instrument goes beyond, or does not fully contain, or incorrectly exhibits, the terms of the contract, which it was written and signed for the purpose of expressing or recording, the rule is settled (and not merely in Courts of equity) that a deed, ex facie just and righteous, may be vitiated and avoided by alleging and adducing extrinsic evidence to prove that it was founded on a consideration, or had a view or purpose, contravening law or public policy."

So, in *The Gas Light and Coke Company* v. *Turner* (*k*), Lord *Abinger* says, that all the decisions shew, that, at common law, a contract entered into to effect an illegal purpose is void and cannot be enforced, and it makes no difference that the contract is under seal. "It is true," continues that learned Judge, "that you cannot add to a contract under seal anything to vary the contract, but you may shew dehors the instrument that such contract was entered into for an illegal purpose; such proof does not vary the terms of the contract, but merely shews the illegal object."

The objection of illegality applies then alike to special as to simple contracts. "Promises," as Paley tells us in his Moral Philosophy (*l*), "are not binding where the perform-

(*i*) See the remarks, ante, p. 340.

(*j*) *Reynell* v. *Sprye*, 1 De G. M. & G. 672.

(*k*) 6 Bing. N. C. 324, 327; and see per *Tindal*, C. J. in S. C. 5 Bing. N. C. 666, 675, cited ante, p. 291.

(*l*) Vol. 1, p. 130; Whewell El. Moral. pp. 233, 245-6.

ance is unlawful," thus—to anticipate a little what I shall presently have to say—if two parties mutually agree, that one of them shall do an act contrary to the express provisions of a public statute, the act to be done being illegal, the promise that it shall be done is void (*m*).

Contracts in direct violation of law.

An action, then, cannot be maintained upon a contract which is in direct violation of law, whether statutory or unwritten—which is of an immoral tendency—or contrary to sound policy. "The common law maxims are (*n*), *ex turpi causâ non oritur actio, ex dolo malo non oritur actio.* They prohibit everything which is unjust or contra bonos mores. The object of all law is to repress vice and to promote the general welfare of society, and it does not give its assistance to a person to enforce a demand originating in his breach or violation of its principles and enactments. Contracts in violation of statutes are void, and they are so whether the consideration to be performed or the act to be done be a violation of the statute" (*o*).

It would be useless to adduce a cloud of authorities in support of the foregoing propositions:—"What," says Lord *Ellenborough*, C. J., "is done in contravention of the provisions of an Act of Parliament cannot be made the subject-matter of an action" (*p*). "Where a contract," says Lord *Tenterden*, C. J., "which a plaintiff seeks to enforce is expressly, or by implication, forbidden by the statute or common law, no Court will lend its assistance to give it effect.

(*m*) *M'Gregor* v. *Deal and Dover R. Co.* 22 L. J. (Q. B.) 69; *East Anglian R. Co.* v. *Eastern Counties R. Co.* 11 C. B. 775.

(*n*) See *Harris* v. *Runnels*, 12 Howard, (U. S.) R. 83.

(*o*) Ibid. Where, however, the act which is the subject of the contract may according to the circumstances be lawful or unlawful, it will not be presumed that the contract was to do the unlawful act; the contrary is the proper inference: per Lord *Abinger*, C. B., *Lewis* v. *Davison*, 4 M. & W. 654, 657.

(*p*) *Langton* v. *Hughes*, 1 M. & S. 596; cited Judgm. *De Begnis* v. *Armistead*, 10 Bing. 110.

And there are numerous cases in the books where an action on the contract has failed because either the consideration for the promise or the act to be done was illegal, as being against the express provisions of the law, or contrary to justice, morality, and sound policy" (*q*).

Either the consideration or the promise may be illegal.

It is, indeed, sufficiently obvious that a contract may be illegal quoad the consideration or quoad the promise. A distinction, however, here requires notice: a consideration bad in part is bad altogether (*r*); whereas the promise may be to do several distinct and independent acts, of which some are legal and some are illegal; if so, the promise will be valid in regard to the former, void as to the latter of such acts (*s*). So, a written agreement may be single and entire, founded on one entire consideration—it may be severable in its nature, and deal with matters which are unconnected with and independent of each other (*t*). And as remarked by Mr. Smith in his note to *Collins* v. *Blantern* (*u*), "in cases where the consideration is tainted by no illegality, but some of the conditions (if the contract in question be a bond) or promises (if it be a contract of any other description) are illegal, the illegality of those which are bad does not communicate itself to or contaminate those which are good, except where, in consequence of some peculiarity in the contract, its parts are inseparable or dependent upon one another."

(*q*) *Wetherell* v. *Jones*, 3 B. & Ad. 226; Judgm. *Cope* v. *Rowlands*, 2 M. & W. 157.

(*r*) *Waite* v. *Jones*, 1 Bing. N. C. 656, 662 (citing *Featherston* v. *Hutchinson*, Cro. Eliz. 199); *Howden* v. *Haigh*, 11 Ad. & E. 1036; per *Tindal*, C. J., *Shackell* v. *Rosier*, 3 Bing. N. C. 646, who remarks:—"Undoubtedly, when a promise rests on two considerations, one of which is *impossible* or *unintelligible*, you may reject the impossible or unintelligible, and resort to that which is possible and plain."

(*s*) See *Bank of Australasia* v. *Breillat*, 6 Moo. P. C. Cas. 152, 201.

(*t*) *Hopkins* v. *Prescott*, 4 C. B. 578, 593. See *Sterry* v. *Clifton*, 9 C. B. 110.

(*u*) 1 Smith. L. C. p. 169 a.

Again, it may be safely laid down, notwithstanding some dicta apparently to the contrary, that, if a contract be rendered illegal by statute, it can make no difference in point of law whether the statute which makes it so has in view the protection of the Legislature or any other object. The sole question will be—Does the statute mean to *prohibit the contract* (*v*)? Such an intention on the part of the Legislature may be manifested as well by the infliction of a penalty as by express prohibitory words, for a *penalty implies a prohibition* (*x*).

Penalty implies prohibition.

It seems to follow à fortiori from what has just been said, that, "if two parties enter into an agreement, whereby it is stipulated that one of them shall be enabled to commit an act that is contrary to public policy, and contrary to the provisions of an Act of Parliament, though not expressly prohibited thereby, except by the imposition of a penalty, the agreement is illegal and void" (*y*).

Upon this part of the subject, I will merely add, that statutes giving rise to questions as to the right to recover the price of goods by vendors who have not complied with the terms of such statutes, are of two classes,—the one class of statutes having for their object the raising and protection of the revenue,—the other class being directed either to the protection of buyers and consumers or to some object of public policy (*z*). In connexion with the former of these two classes, the difficulty most likely to occur to the prac-

(*v*) *Cope* v. *Rowlands*, 2 M. & W. 149, 157; acc. *Smith* v. *Mawhood*, 14 M. & W. 452, 464, (which recognises *Johnson* v. *Hudson*, 11 East, 180); *Bailey* v. *Harris*, 12 Q. B. 905; *Bull* v. *Chapman*, 8 Exch. 444; *Foster* v. *Oxford &c. R. Co.*, 13 C. B. 200.

(*x*) Per Lord *Holt*, *Bartlett* v. *Vinor*, Carth. 252; *Cope* v. *Rowlands*, supra; *Fergusson* v. *Norman*, 5 Bing. N. C. 76, 84, 85.

(*y*) Per *Maule*, J., *Ritchie* v. *Smith*, 6 C. B. 462, 477.

(*z*) Judgm. *Cundell* v. *Dawson*, 4 C. B. 376, 397. See *Forster* v. *Taylor*, 5 B. & Ad. 887, 896; *Smith* v. *Bromley*, 2 Cowp. 696, note.

titioner will be in determining whether the infliction of a penalty implies a prohibition of the contract. In connexion with the latter, the inquiry will, in the absence of any special contract, most probably be, whether, by reason of the vendor's noncompliance with the provisions of some specific statute, the law will decline to imply a promise on the part of the purchaser to pay for the goods sold (*a*).

Assuming that a transaction has occurred clearly in contravention of law, and that the various points already suggested as likely to present difficulty have been satisfactorily disposed of, it may still be necessary to inquire whether the connexion subsisting between such illegal transaction and the contract under consideration is sufficiently close to invalidate the latter.

We have seen, that, where a contract grows *immediately* out of an illegal act, a Court of justice will not lend its aid to enforce it; a man, for instance, who imports goods for another in violation of our law, cannot maintain an action for the value or freight of the goods, or for advances made on them (*b*). So it has been held, that one of two parties to an agreement to suppress a prosecution for felony cannot maintain an action against the other for an injury arising out of the transaction in which they have both been illegally engaged (*c*). And where, in consideration that plaintiff had published a libel at the defendant's request, and had, at the like request, consented to defend an action brought against plaintiff for such publication, the defendant promised to indemnify plaintiff from the costs of the action: the promise so to do was held to be void (*d*).

(*a*) Judgm. 4 C. B. 397.

(*b*) *Armstrong* v. *Toler*, 11 Wheaton (U. S.) R. 258, which will be found well worthy of perusal: *Holman* v. *Johnson*, Cowp. 341; 1 Story Eq. Jurisp., 6th ed., p. 69.

(*c*) *Fivaz* v. *Nicholls*, 2 C. B. 501.

(*d*) *Shackell* v. *Rosier*, 2 Bing. N. C. 634.

So, if the contract in question be in part only connected with the illegal transaction, it will nevertheless be tainted thereby, ex. gr., if the importation of goods contraband of war were the result of a scheme to consign the goods to a third person on behalf of the importer, in order that he might protect and defend them for the owner in case they should be brought into jeopardy by seizure or by legal process, a bond afterwards given or promise made by the owner to the consignee by way of indemnity to the latter would, it is conceived, be invalid as constituting a part of the original transaction, although purporting to be a new and independent contract (*e*).

Thus far, then, the doctrine under consideration may, with tolerable precision, be enunciated. But then the question arises, does the taint in the original transaction infect and vitiate every contract growing out of it, however remotely connected with it? This cannot with reason be contended for; inasmuch as the consequence of such a rule would be, that parties innocently contracting might suffer for a precedent illegality connected with or perhaps giving rise to the subject-matter of their contract (*f*). If, under such circumstances as here adverted to, doubt is entertained, the test most likely to prove serviceable to the practitioner would seem to be, does the plaintiff require aid from the illegal transaction in order to establish his claim (*g*)? if so, his declaration will, according as the defect is or is not apparent therein, be exposed either to a demurrer or to a special plea of illegality.

(*e*) *Armstrong* v. *Toler*, 7 Wheat. (U. S.) R. 258; *Collins* v. *Blantern*, cited ante, p. 288.

(*f*) *Armstrong* v. *Toler*, 11 Wheat. (U. S.) R. 258, where examples illustrating the text are given.

(*g*) *Simpson* v. *Bloss*, 7 Taunt. 246.

Lastly, where the consideration and the matter to be performed are both legal, a plaintiff would not, it seems, be precluded from recovering by an infringement of the law collateral to and not contemplated by the contract in the performance of something to be done on his part(*h*).

The decision of the Court of error in *Fisher* v. *Bridges*(*i*) is important with reference to contracts illegal by reason of their being opposed to the statute law. There, to a declaration in covenant for the payment of a certain sum of money, the defendant pleaded, that, before the making of the deed declared upon, it was unlawfully agreed between the plaintiff and defendant, that the former should sell and the latter purchase of him a conveyance of land for a term of years, in consideration of a sum of money to be paid by the defendant to the plaintiff, "to the intent and in order and for the purpose, as the plaintiff at the time of the making the said agreement well knew," that the land should be sold by lottery, contrary to the form of the statutes in such case made and provided; that afterwards, "in pursuance of the said illegal agreement," the land was assigned for the term, and a part of the purchase-money remaining unpaid, the defendant, to secure the payment thereof, made the deed and covenant in the declaration mentioned. Upon these pleadings, the Court of Queen's Bench held, that the contract in question appeared to have been made after the illegal transaction between the plaintiff and defendant had terminated; that it formed no part of such transaction, and was consequently unaffected by it. The judgment thus given was, however, reversed in error upon reasoning of the

(*h*) Per Lord *Tenterden*, C. J., *Wetherell* v. *Jones*, 3 B. & Ad. 226; *Fergusson* v. *Norman*, 5 Bing. N. C. 76, 84; *Pidgeon* v. *Burslem*, 3 Exch. 470-1.

(*i*) 3 E. & B. 642, reversing judgment in *S. C.*, 2 E. & B. 118. See *O'Connor* v. *Bradshaw*, 5 Exch. 882.

following kind, which seems conclusive:—the original agreement was clearly tainted with illegality, inasmuch as all lotteries are prohibited by the stat. 10 & 11 Will. 3, c. 17, s. 1; and by the 12 Geo. 2, c. 28, s. 4, all sales of houses, lands, &c. by lottery are declared to be void to all intents and purposes. The agreement being illegal, then, could not be enforced, and no action could have been brought to recover the purchase-money of the land which was the subject-matter thereof; the covenant accordingly, being connected with an illegal agreement, could not be enforced (*k*).

Even if the plea above abstracted were not to be understood as alleging that the covenant declared upon was given in pursuance of an illegal agreement, it would, remarked the Court of Exchequer Chamber, still shew a good defence to the action, for "the covenant was given for the payment of the purchase-money. It springs from and is the creature of that illegal agreement; and, if the law would not enforce the illegal contract, so neither will it allow parties to enforce a security for purchase-money which, by the original bargain, was tainted with illegality."

Contracts opposed to public policy.

When a contract is said to be void as "opposed to public policy," reference is made to that principle of law, in accordance with which "no subject can lawfully do that which has a tendency to be injurious to the public or against the public good—which may be termed, as it sometimes has been, the policy of the law, or 'public policy,' in relation to the administration of the law" (*l*). The "doctrine

(*k*) *Paxton* v. *Popham*, 9 East, 408; *The Gas Light Co.* v. *Turner*, 6 Bing. N. C. 324.

(*l*) Per Lord *Truro*, *Egerton* v. *Earl Brownlow*, 1 H. L. Cas. 196, where the meaning of the term in question was much discussed. In that case, *Parke*, B. observes, that "'public policy' is a vague and unsatisfactory term, and calculated to lead to uncertainty and error when applied to the decision of legal rights; it is capable of being understood in different senses; it may and

of the public good or the public safety, or what is sometimes called *public policy,*" as remarked by a learned Judge, "being the foundation of law, is supported by decisions in every branch of the law; and an unlimited number of cases may be cited (*m*), as directly and distinctly deciding upon contracts and covenants on the avowed broad ground of the public good, and on that alone" (*n*). This doctrine is asserted by Sir *E. Coke* under the maxim *nihil quod est inconveniens est licitum* (*o*).

Primâ facie, as we have already seen, all persons are free to make such contracts as they please (*p*), and are morally and legally bound by them, provided they adopt the formalities required by the common and statute law. Contracts have, however, been deemed to be illegal and void in many cases as opposed to public policy. Thus, at common law, wagers which are foolish, or tend to annoy others, or to waste the time of the Court (*q*), or to outrage decency (*r*), have been discountenanced. And if a wager were laid by a

does in its ordinary sense mean 'political expedience,' or that which is best for the common good of the community, and in that sense there may be every variety of opinion according to the education, habits, talents, and dispositions of each person who is to decide whether an act is against public policy or not. To allow this to be a ground of judicial decision would lead to the greatest uncertainty and confusion." And see per *Alderson*, B., Id. 106, and in *Hibblewhite* v. *M'Morine*, 5 M. & W. 467.

(*m*) Generally, as to agreements against public policy, see *The Shrewsbury and Birmingham Railway Co.* v. *The London and North Western Railway Co.* 21 L. J. (Q. B.) 89; *Simpson* v. *Lord Howden*, 9 Cl. & F. 61; *Coppock* v. *Bower*, 4 M. & W. 361; *Mittelholzer* v. *Fullarton*, 6 Q. B. 989; *Millward* v. *Littlewood*, 5 Exch. 775; Per Lord *Mansfield*, C. J., *Jones* v. *Randall*, 1 Cowp. 39; and in *Holman* v. *Johnson*, Id. 343; *Kilham* v. *Collier*, 21 L. J. (Q. B.) 65; *Scott* v. *Avery*, 8 Exch. 487.

(*n*) Per *Pollock*, C. B., *Egerton* v. *Earl Brownlow*, 4 H. L. Cas. 144-5.

(*o*) Co. Litt. 66. a.

(*p*) Ante, p. 262.

(*q*) *Eltham* v. *Kingsman*, 1 B. & Ald. 683, 688.

(*r*) *Da Costa* v. *Jones*, Cowp. 729; *Thakoorseydass* v. *Dhondmull*, 6 Moo. P. C. Cas. 300, 310.

Judge upon the event of a cause which he would be called upon to decide, it would be against the established rule—*nemo in propriâ causâ judex esse debet*(s)—to allow the party laying such a wager to acquire an interest in it(t).

Many other contracts have also been held to be illegal on principles long recognised by the common law, ex. gr., marriage brocage bonds—that is, bonds for the procuring of marriages(u); contracts not to marry(x); deeds and agreements made in contemplation of a future separation between husband and wife(y); contracts made with a view to compromising prosecutions for felonies or misdemeanors(z); contracts in restraint of trade or against alienation of land, including those which violate the law of perpetuities. So, in bankruptcy, the object and policy of the bankrupt laws is to make a rateable distribution of the bankrupt's property amongst all his creditors; and preferences given to particular creditors by a trader in contemplation of bankruptcy are in violation of the policy of the bankrupt laws, and are

(s) See *Dimes* v. *The Grand Junction Canal Co.*, 3 H. L. Cas. 759.

(t) *Jones* v. *Randall*, Cowp. 37. The statute now in force with reference to wagers, and which declares them to be null and void, is the 8 & 9 Vict. c. 109; as to which see *Johnson* v. *Lansley*, 12 C. B. 468; *Varney* v. *Hickman*, 5 C. B. 271; *Batty* v. *Marriott*, Id. 818; *Grizewood* v. *Blane*, 11 C. B. 526; *Hay* v. *Ayling*, 16 Q. B. 423. See also the 16 & 17 Vict. c. 119.

(u) *Hall* v. *Potter*, 3 Lev. 411; where the House of Lords held, that "all such contracts concerning marriages are of dangerous consequence, and not to be allowed." See also the cases on this subject cited arg. 15 Q. B. 469; *Earl of Chesterfield* v. *Janssen*, 1 Atk. 352.

(x) *Morley* v. *Rennoldson*, 2 Hare, 570; *Lowe* v. *Peers*, 4 Burr. 2225, *S. C.* Wilmot, 364; *Baker* v. *White*, 2 Vern. 215; *Hartley* v. *Rice*, 10 East, 22.

(y) *Hindley* v. *Marquis of Westmeath*, 6 B. & Cr. 200. But a deed providing for the wife's support on an immediate separation is good, *Jones* v. *Waite*, 9 Cl. & F. 101, affirming judgm. in *S. C.* 5 Bing. N. C. 341. In *Wilson* v. *Wilson*, 1 H. L. Cas. 538, the authorities upon this subject are collected.

(z) Ante, pp. 288-9. *Fivaz* v. *Nicholls*, 2 C. B. 501; *Ex parte Critchley*, 3 D. & L. 527; *Ward* v. *Lloyd*, 6 M. & Gr. 85; *Haigh* v. *Jones*, 5 M. & Gr. 634; *Osbaldiston* v. *Simpson*, 13 Sim. 513.

therefore held to be fraudulent and void(*a*). And without multiplying instances of contracts which are opposed to public policy, we may conclude, in the words of Lord *Ellenborough*(*b*), that, "wherever the tolerating of any species of contract has a tendency to produce a public mischief or inconvenience, such a contract has been held to be void."

Contracts in restraint of trade.

Of the various kinds of contracts above enumerated, those in restraint of trade, by reason of their practical importance, require some especial notice. Upon this subject the leading case is *Mitchel* v. *Reynolds*(*c*); and in the note appended thereto in Mr. Smith's Selection of Leading Cases(*d*) the law relating to contracts in restraint of trade is fully set forth. It may be shortly stated thus: that although a bond, covenant, or agreement in restraint of trade generally is bad, yet a contract in partial restraint of trade, if made upon a consideration actual and *bonâ fide* and not colourable merely, will, provided it does not impose an unreasonable degree of restriction, be upheld.

The judgment of the Court of Exchequer in *Mallan* v. *May*(*e*) exhibits very clearly the general principles which have actuated our tribunals, as well of equity as of law, in upholding (with certain important limitations) contracts of the kind alluded to. Contracts in total restraint of trade

(*a*) Per *Cresswell*, J., 4 H. L. Cas. 87. See *Smith* v. *Salzmann*, 9 Exch. 535; *Wilkin* v. *Manning*, Id. 575; *Hills* v. *Mitson*, 8 Exch. 751; *Coles* v. *Strick*, 15 Q. B. 2, where a contrivance in fraud of the Court of Bankruptcy was held to avoid an agreement.

(*b*) *Gilbert* v. *Sykes*, 16 East, 156, (as to which see the remarks, 4 H. L. Cas. 125, 148, and in 6 Moo. P. C. Cas. 312); see *Cook* v. *Field*, 15 Q. B. 460; *Doe* d. *Williams* v. *Evans*, 1 C. B. 717. As to contracts for the sale of offices, see 2 Bing. 229, 247; *Sterry* v. *Clifton*, 9 C. B. 110. As to contracts originating out of gambling transactions, see *Quarrier* v. *Colston*, 1 Phill. 147. As to champerty, *Strange* v. *Brennan*, 10 Jur. 649; *Flight* v. *Leman*, 4 Q. B. 883; *Findon* v. *Parker*, 11 M. & W. 675; *Reynell* v. *Sprye*, 1 De G. M. & G. 660.

(*c*) 1 P. Wms. 181.

(*d*) P. 171.

(*e*) 11 M. & W. 653, 665; *Price* v. *Green*, 16 M. & W. 346, 352; *S. C.*, 13 M. & W. 695.

(it is there said), which the law so much favours, are absolutely bad. Contracts in partial restraint of trade, if nothing more appear, are presumed to be bad (*f*); but if the circumstances are set forth, that presumption may be excluded; and the Court are to judge of those circumstances, and to determine whether the contract submitted for their consideration be valid or not.

Therefore, if there be simply a stipulation, though in an instrument under seal, that a trade or profession shall not be carried on in a particular place, without any recital in the deed, and without any averments shewing circumstances rendering such a contract reasonable, the instrument is void. But if there are circumstances recited in the instrument, (or probably if they appear by averment), it is for the Court to determine, whether the contract in question be a fair and reasonable one or not; and the test appears to be—whether it be prejudicial or not to the public interest; for it is on grounds of public policy alone, that these contracts are supported or avoided. Contracts for the partial restraint of trade are upheld, not because they are advantageous to the individual with whom the contract is made, and a sacrifice pro tanto of the rights of the community, but because it is for the benefit of the public at large that they should be enforced. Many of these partial restraints on trade are perfectly consistent with public convenience and the general interest, and have been supported; such is the case of the

(*f*) Acc. per *Williams*, J., *Sainter* v. *Ferguson*, 7 C. B. 730; and cases cited 1 Smith L. C. 181-2.

It is observable, that, in *Tallis* v. *Tallis*, 1 E. & B. 391, the Court of Queen's Bench remark thus:—"In *Mitchel* v. *Reynolds* it is said, 'wherever such contract (in restraint of trade) *stat indifferenter*, and for aught appears may be either good or bad, the law presumes it *primâ facie* to be bad.' But, according to the tenor of the later decisions, the contract is valid, unless some restriction is imposed beyond what the interest of the plaintiff requires."

disposing of a shop in a particular place, with a contract on the part of the vendor not to carry on a trade in the same place. This is, in effect, the sale of a goodwill, and offers an encouragement to trade, by allowing a party to dispose of all the fruits of his industry (*g*). And such is the class of cases of much more frequent occurrence, of a tradesman, manufacturer, or professional man taking a servant or clerk into his service, with a contract that he will not carry on the same trade or profession within certain limits (*h*). In such a case, the public derives an advantage in the unrestrained choice which such a stipulation gives to the employer of able assistants, and the security it affords, that the master will not withhold from the servant instruction in the secrets of his trade, and the communication of his own skill and experience, from the fear of his afterwards having a rival in the same business (*i*).

Such being the general reasoning now recognised with regard to contracts in partial restraint of trade (*j*), let us inquire what conditions are essential to their validity, that is, under what circumstances such contracts will be deemed "fair and reasonable" by the Courts.

Some consideration necessary.

Now, in the first place, a contract in restraint of trade must have *some* consideration to support it. If there be no consideration for it, or a consideration of no real value (*k*), the contract must "either be a fraud upon the rights of the party restrained or a mere voluntary contract, a nudum pactum, and therefore void" (*l*). The Court, however, will not

(*g*) See *Prugnell* v. *Gosse*, Aleyn, 67; *Broad* v. *Jolliffe*, Cro. Jac. 596; *Jelliet* v. *Broad*, Noy, 98.

(*h*) See *Chesman* v. *Nainby*, 2 Ld. Raym. 1456.

(*i*) Judgm. 11 M. & W. 665–6.

(*j*) Such contracts were however, formerly held to be illegal. See per Lord *St. Leonards*, 4 H. L. Cas. 237–9.

(*k*) See per Lord *Abinger*, C. B., *Leighton* v. *Wales*, 3 M. & W. 550.

(*l*) 6 Ad. & E. 438, 457. The former rule, as to the adequacy of

inquire respecting the *adequacy* of the consideration. This point was finally determined in *Hitchcock* v. *Coker* (*m*), since which case the law there laid down with reference to it has been uniformly adhered to (*n*).

The Court can have no judicial perception of the ratio of the consideration to the restriction; if there were a legal consideration of value, passing to the contractor, the contract will be enforced, without reference to the quantum of that value (*o*).

If the restraint of trade contemplated by the agreement between the parties be unreasonable, such agreement is void altogether; if not, it is lawful, the only question being whether there is a consideration to support it; and the adequacy of the consideration the Court will not inquire into, but will leave the parties to make the bargain for themselves (*p*).

Assuming that there is some consideration to support an agreement in restraint of trade, the reasonableness and validity of the contract will have mainly to be determined by reference to the degree of restraint which it seeks to impose, and which may be considered in regard as well to its duration as to the superficial area over which it is intended to be operative.

Duration of restraint.

In regard to the *duration* of the restriction, it is now settled that it may continue during the life of the contractor, and that it is limited neither to the period during which the contractee may carry on his business, nor even to the term of his life.

the consideration, will be found stated in *Young* v. *Tummins*, 1 C. & J. 331; *Horner* v. *Graves*, 7 Bing. 735.

(*m*) 6 A. & E. 438.

(*n*) Per *Williams*, J., *Sainter* v. *Ferguson*, 7 C. B. 730.

(*o*) Judgm. *Tallis* v. *Tallis*, 1 E. & B. 410.

(*p*) Per *Alderson*, B., *Pilkington* v. *Scott*, 15 M. & W. 660, cited in *Rey* v. *Welch*, 2 E. & B. 363, and *Hartley* v. *Cummings*, 5 C. B. 247.

The reasoning in support of this doctrine is as follows:—"The goodwill of a trade is a subject of value and price. It may be sold, bequeathed, or become assets in the hands of the personal representative of a trader. And if the restriction as to time is to be held to be illegal if extended beyond the period of the party by himself carrying on the trade, the value of such goodwill considered in those various points of view is altogether destroyed"(*q*). If then (to take a case of ordinary occurrence) it be not unreasonable, as undoubtedly it is not, to prevent a servant from entering into the same trade in the same town in which his master lives so long as the master carries on the trade there, it does not seem unreasonable that the restraint should be carried further, and should be allowed to continue if the master sells the trade, or bequeaths it, or if it becomes the property of his personal representative: that is, if it be reasonable that the master should by an agreement secure himself from a diminution of the annual profits of his trade, it does not appear unreasonable that the restriction should go so far as to secure to the master the enjoyment of the price or value for which the trade would sell, or secure the enjoyment of the same trade to his purchaser, or legatee, or executor. And this can only be effected by making the restriction of the servant's setting up or entering into the trade or business within the given limit co-extensive with the servant's life(*r*).

The principle established by *Hitchcock* v. *Coker* and recognised in subsequent cases, accordingly, is, that a restriction reasonably limited as to space, but enduring for the life of the party restrained, is valid(*s*).

(*q*) Judgm. *Hitchcock* v. *Coker*, 6 A. & E. 454.

(*r*) Judgm. *Hitchcock* v. *Coker*, 6 A. & E. 454-5; *Archer* v. *Marsh*, Id. 959; *Wallis* v. *Day*, 2 M. & W. 273.

(*s*) Judgm. *Elves* v. *Crofts*, 10 C. B. 259, citing *Mallan* v. *May*, 11 M.

Limitation in regard to space.

In determining as to the reasonableness of a contract in restraint of trade, regard being had to the *extent of area* over which it is to be in force, our Courts will consider whether the restraint in question, to which *some* limit *must* be assigned(*t*), is larger and wider than the protection of the party with whom the contract is made can possibly require; if it be so, such restraint must be deemed unreasonable in law, and the contract which would enforce it will be void(*u*).

Sometimes difficulty may be felt in applying the general principle just stated to particular facts; and where the question turns upon the reasonableness or unreasonableness of the restriction of the party from carrying on trade or business(*x*) within a certain space or district, the answer may depend upon various circumstances that may be brought to bear upon it: such as the nature of the trade or profession, the populousness of the neighbourhood, the mode in which the trade or profession is usually carried on(*y*), and other matters with which the Court cannot in reason be supposed to be conversant(*z*). From decided cases we collect, however, that the interest of the party claiming protection has been held to extend very widely. Thus, contracts between professional men have been supported where the area of

& W. 653; *Rannie* v. *Irvine*, 7 M. & Gr. 969; *Pemberton* v. *Vaughan*, 10 Q. B. 87; *Hastings* v. *Whitley*, 2 Exch. 611; *Atkyns* v. *Kinnier*, 4 Exch. 776; acc. *Tallis* v. *Tallis*, 1 E. & B. 391.

(*t*) Per *Parker*, C. J., *Mitchel* v. *Reynolds*, 1 P. Wms. 181; *Tallis* v. *Tallis*, 1 E. & B. 411; *Ward* v. *Byrne*, 5 M. & W. 548; *Hinde* v. *Gray*, 1 M. & Gr. 195; per *Best*, C.J., *Homer* v. *Ashford*, 3 Bing. 326.

(*u*) Judgm. *Hitchcock* v. *Coker*, 6 A. & E. 454. See ante, p. 369.

(*x*) As to the meaning of the phrase "carrying on business" at a place, see *Turner* v. *Evans*, 2 E. & B. 512; *S. C.* 2 De G. M. & G. 740.

(*y*) Judgm. *Hitchcock* v. *Coker*, 6 A. & E. 454; acc. *Pemberton* v. *Vaughan*, 10 Q. B. 87; *Horner* v. *Graves*, 7 Bing. 735, 743.

(*z*) As to the mode of raising on the record the question as to the reasonableness of a restraint of trade, see *Tallis* v. *Tallis*, 1 E. & B. 413-4.

exclusion was apparently greater than the area of the plaintiff's practice. In *Horner* v. *Graves* (*a*), where the area of exclusion from practice as a dentist was a circle round York of the diameter of two hundred miles, although holding the restriction too large, the Court observe, that, unless the case was such that the restraint was plainly and obviously unnecessary, they would not feel themselves justified in interfering. In *Mallan* v. *May* (*b*), where exclusion from the practice of a dentist in London was held to be reasonable and valid, the Court say, "it would be better to lay down such a limit as under any circumstances would be sufficient protection to the interest of the contracting party, and, if the limit stipulated for does not exceed that, to pronounce the contract to be valid." In *Price* v. *Green* (*c*), a covenant not to carry on a certain trade "within the cities of London or Westminster, or within the distance of 600 miles from the same respectively," was held to be divisible—good, so far as it related to London and Westminster; but void as to the other part. And, in *Tallis* v. *Tallis* (*d*), a covenant was held good, by which the defendant restricted himself from carrying on the business of a canvassing publisher in London and within 150 miles of the General Post Office, or in Liverpool or Manchester or within a like distance of either of those towns; such restriction, regard being had

(*a*) 7 Bing. 735, 744, citing *Davis* v. *Mason*, 5 T. R. 118, and *Bunn* v. *Guy*, 4 East, 190.

(*b*) 11 M. & W. 667; and as to the construction of the agreement in this case, see *S. C.*, 13 M. & W. 511.

(*c*) 16 M. & W. 346; *S. C.*, 13 M. & W. 695; acc. *Nicholls* v. *Stretton*, 10 Q. B. 346; *S. C.*, 7 Beav. 42.

(*d*) 1 E. & B. 391. An agreement by a party not to be "concerned in any trading establishment" within a considerable portion of a county, was upheld in *Avery* v. *Langford*, 1 Kay, 663; in the note to which case (Id. 667-8) a useful abstract is given of the recent decisions of the Courts of law and equity with reference to contracts in restraint of trade.

to the nature of the plaintiff's business, not appearing to the Court to be unreasonable.

Immoral contracts.

A few instances will suffice to shew, that a contract of *immoral tendency* cannot, as between the parties thereto, be made the foundation of an action:—an agreement with a view to future illicit cohabitation is void (*e*); the rent of lodgings let to an immodest woman, to enable her to consort therein with the other sex cannot be recovered (*f*); a printseller cannot recover the price of libellous or indecent prints delivered to the defendant (*g*).

It is clear, that *past* cohabitation or previous seduction would not be a good consideration for a parol promise, neither would it be an illegal consideration,—it would be no consideration at all. Inasmuch, however, as an instrument under seal does not require a consideration to support it, a bond given for the maintenance of a woman, founded on past cohabitation, would be good; but it by no means thence follows, that a covenant to pay a sum of money tainted with illegality can be enforced (*h*). And if an agreement had been made to pay a sum of money in consideration of *future* cohabitation, and after cohabitation the money had remained unpaid, a bond given to secure that money could not under the circumstances be enforced (*i*).

To sum up briefly what has here been said as to the effect

(*e*) *Walker* v. *Perkins*, 3 Burr. 1568.

(*f*) *Girardy* v. *Richardson*, 1 Esp. 13; *Appleton* v. *Campbell*, 2 Car. & P. 347. See *Jennings* v. *Throgmorton*. R. & M. 251; *Bowry* v. *Bennet*, 1 Camp. 348; *Lloyd* v. *Johnson*, 1 B. & P. 340. See *Feret* v. *Hill*, 23 L. J., C. P., 185.

(*g*) *Force* v. *Johnes*, 4 Esp. 97. See *Stockdale* v. *Onwhyn*, 5 B. & C. 173.

(*h*) Judgm. *Fisher* v. *Bridges*, 3 E. & B. 650; ante, p. 301.

(*i*) Judgm. *Fisher* v. *Bridges* supra. As to securities given in respect of past or future cohabitation, see *Hall* v. *Palmer*, 3 Hare, 532; *Smyth* v. *Griffin*, 14 L. J., Chanc., 28; *Batty* v. *Chester*, 5 Beav. 103.

of fraud and illegality upon a contract. Whatever be its nature or subject-matter, the strictest good faith ought, both in its inception and performance, to be observed by the contracting parties. A want of bona fides may be evinced as well by the wilful suppression of facts as by their misstatement: *qui tacet consentire videtur* is a rule well recognised in law, and of no infrequent applicability. There may be a fraudulent representation sufficient to avoid a contract or to be the ground of an action, without actual active declaration by the party contracting (*k*).

But, although good faith in its broad and comprehensive sense is thus required, and although a man will not be permitted to benefit by his own fraud or to take advantage of his own wrong, our law nevertheless expects that due care and a reasonable degree of caution should be exercised by either party to a contract. Sometimes, therefore, it will say to the disappointed suitor—*vigilantibus non dormientibus jura subveniunt;* and at other times, where evidence presents itself of a gross amount of negligence and want of caution, it will remind a purchaser, however innocent, that *qui vult decipi decipiatur*. Lastly, where an individual, seeking repayment of money improperly obtained from him, is shewn to be contaminated with fraud, or to have participated in a transaction objectionable on moral grounds, or opposed to the word, intent, or policy of the law, it will altogether refuse to interfere, answering his application in the words of C. J. *Wilmot* (*l*), that "no polluted hand shall touch the pure fountains of justice."

And yet, whether lending or withholding its aid when

(*k*) Per *Coltman*, J., *Pilmore* v *Hood*, 5 Bing. N. C. 109. See *Keates* v. *Earl of Cadogan*, 10 C. B. 591, (which explains *Hill* v. *Gray*, 1 Stark. N. P. C. 434), and cases there cited.

(*l*) Ante, p. 290.

supplicated for breach of contract, our law (which has been not inaptly designated as *norma recti* (*m*), *jubens honesta et prohibens contraria* (*n*)) in no case acts contrary to the spirit of the rule laid down by the Prætor, but says with him—*Pacta conventa, quæ neque dolo malo neque adversus leges facta erunt, servabo* (*o*).

(*m*) 3 Bulstr. 313.

(*n*) 2 Inst. 587.

(*o*) D. 2. 14. 7, §. 7. As to the consideration of a contract generally, and as to contracts founded in fraud or illegality, see further, Kent Com. 7th edit. Vol. 2, p. 582; Chitt. Contr. ch. 4, where the cases are collected.

CHAPTER II.

THE STATUTE OF FRAUDS, &c.

In the preceding pages the nature of a simple contract has been to some extent examined, and certain general rules applicable thereto have been laid down. No attempt, however, has yet been made fully to compare a simple with a special contract in respect of those characteristics appertaining to the latter which have been specified at p. 276. That a 'consideration' is requisite to support a contract not under seal has indeed been shewn, and from the explanations already offered touching the doctrine of 'merger,' it will probably have been surmised, that that particular doctrine; at all events, does not and cannot in strictness apply where the solemnity of a seal is wanting. Before, however, proceeding further with the comparison suggested, it will be essential to indicate in what respects a simple contract evidenced by writing differs from an oral agreement, and to exhibit some of the more important statutory regulations bearing upon this subject. In the present chapter I purpose, then, to commence with a brief view of the wording and practical operation of certain sections of the Statute of Frauds, and to conclude with some few additional remarks as to simple contracts generally.

Parol contract—what.

Now, "all contracts are by the laws of England distinguished into agreements by *specialty* and agreements by *parol;* nor is there any such third class as *contracts in writing;* if they are merely written and not specialties they are parol:" such are the words of Chief Baron *Skyn-*

ner, as reported in *Rann* v. *Hughes* (*a*). But, although this is so, our common law, which requires, as a general rule, that the best evidence of every transaction which the nature of the case admits of shall be given, ascribes a certain degree of weight and importance to a *written*, which it denies to an *oral* or *merely verbal* contract; that is to say, our law considers, that, where an agreement between two parties has been reduced into writing, that writing itself offers the best evidence which can be given for determining what the intentions of the parties really were (*b*), and what their reciprocal obligations are.

Hence, if there be a written contract between A. and B., which is duly signed by them and is meant to constitute per se a complete and entire agreement, evidence is inadmissible to shew what passed by word of mouth between the parties, either before the written instrument was made, or during the time that it was in a state of preparation and adjustment, so as to vary its effect. When, however, an agreement has actually been reduced into writing, it is at common law competent to the parties at any time before breach of it by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or, as it seems, to vary or qualify the terms of it, and thus to make a new contract, which is to be proved partly by the written agreement and partly by the subsequent verbal terms engrafted upon what may be thus left of the written agreement (*c*).

What has been above said admits, in part, of illustration by

(*a*) 7 T. R. 350, *a*.

(*b*) "It is contrary to the rules of law to admit extrinsic evidence to shew that the intention of a party executing a written instrument is different from that apparent on the face of the instrument itself," per *Abbott*, C. J., *Woodbridge* v. *Spooner*, 3 B. & Ald. 233. See also *Martin* v. *Pycroft*, 2 De G. M. & G. 785.

(*c*) *Goss* v. *Lord Nugent*, 5 B. & Ad. 64-5; 2 Phil. Ev. 10th ed. 363-4.

reference to one of the most important instruments known to the law merchant. Thus, it is not competent to the acceptor of a bill of exchange to set up an oral contract entered into *before his acceptance* of the bill, and which is inconsistent with the contract appearing ex facie upon it(*d*). Neither can a like *contemporaneous* agreement, incompatible with that evidenced by the bill, be set up to vary or restrain it: ex. gr. evidence cannot be received of an oral agreement, that a bill drawn payable at three months shall not be payable till the expiration of four months from its date(*e*). "It would," says Lord *Abinger*, C. B., in *Adams* v. *Wordley* (*f*), "be very dangerous to allow a party to alter in such a manner the absolute contract on the face of a bill of exchange; the effect of the cases is, that you are estopped from saying that you made any other contract than the absolute one on the face of the bill. A contract, which seeks by subsequent oral matter to discharge altogether the contract created by the bill and create a new one, is wholly different, and may no doubt be given in evidence: it is consistent with the bill, but this is inconsistent with it."

The following case also illustrates very clearly the doctrine of our law just mentioned: Money was advanced upon the security of a joint and several promissory note by a loan society, and at the time of effecting the loan and making the note a printed book of the society's rules was given to the defendant, who was one of the makers of the note. Now, the rules contained in this book would, *if admissible*

(*d*) *Besant* v. *Cross*, 10 C. B. 895.

(*e*) Judgm. *Manley* v. *Boycot*, 2 E. & B. 56. See *Salmon* v. *Webb*, 3 H. L. Cas. 510. But evidence may be given by parol of an agreement at the time a bill is drawn and indorsed which is consistent with the written instrument, as, for example, that a bill is indorsed and handed over for a particular purpose, without giving the bailee the usual rights of indorsee of the bill: *Manley* v. *Boycot*, supra.

(*f*) 1 M. & W. 374, 380.

in evidence, have varied the engagement which the defendant entered into as maker of the note. Nothing, however, appeared in writing to connect the rules in question with the note, and the Court held, that the express contract and engagement on the face of the note could not be varied save by a contemporaneous written agreement(*g*); the reception of which in evidence would have been altogether unobjectionable (*h*).

In *Eden* v. *Blake*(*i*) the action was brought by an auctioneer to recover the price of a dressing case sold by him to the defendant at a public auction. The dressing case in question had, in the printed catalogue of articles intended for sale, been described as having silver fittings; whereas, in point of fact, the fittings were plated only. In support, however, of the action, it was proposed to prove, that, prior to the dressing case being put up for sale, the auctioneer stated publicly, in the hearing of the defendant, that the catalogue was incorrect in describing the fittings as silver, and that the dressing case would be sold as having plated fittings. The reception of this evidence was objected to, on the ground that it tended to vary the printed particulars of sale; the evidence tendered was, nevertheless, admitted, and, as the Court in banc held, rightly so, there having been no written contract between the parties. In this case the Statute of Frauds had no application, inasmuch as the price of the article sold was less than 10*l.*; the decision arrived at consequently illustrates the general rule(*k*) of evidence already stated.

Thus much, then, as to the superior efficacy which our

(*g*) *Brown* v. *Langley*, 4 M. & Gr. 466.

(*h*) See *The Fishmongers' Company* v. *Dimsdale*, 6 C. B. 896.

(*i*) 13 M. & W. 614, with which compare *Shelton* v. *Livius*, 2 C. & J. 411.

(*k*) As to this rule, see further, 2 Ph. Ev. 10th ed. 352; *Woollam* v. *Hearn*, 7 Ves. 217-8; post, Chap. 4.

common law attributes to a written over a merely verbal contract. It is in the next place to be remarked, that, under the provisions of various statutes, particular kinds of contracts are expressly required to be in writing; and where any such statute applies, it is quite clear that the *whole* of the contract which falls within its operation must be in writing, so that a written agreement or engagement between parties made conformably to its terms could not subsequently be varied by word of mouth (*l*). Foremost in point of practical importance amongst such enactments stands the Statute of Frauds (29 Car. 2, c. 3).

The Statute of Frauds was passed, as the preamble states, "for prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury and subornation of perjury." It has a most important bearing, by virtue of several of its provisions, upon the law merchant; and with reference more particularly to that branch of law I shall now direct attention to it. The statute requires that certain contracts and agreements therein specified shall be in writing, or, at all events, shall be evidenced by some note or memorandum thereof in writing. It further indicates disabilities, which, in default of compliance with its requirements in this respect, will or may be entailed upon parties. In order to determine the precise nature of the disabilities, which, under given circumstances, may thus be incurred, close attention must be paid to the wording of the particular section of the Act bearing upon the transaction in question.

Omitting any allusion to those portions of the Act which relate to parol conveyances of land, leases, and assignments, to nuncupative wills, devises, declarations of trust, and other matters not properly falling within the scope of these Com-

(*l*) Various cases, hereafter cited, will be found to establish the truth of this proposition in regard to the Statute of Frauds.

mentaries, I shall proceed to analyse, illustrate, and explain, by decided cases, its 4th and 17th sections, my object being to call attention, albeit briefly, to every point of real practical importance connected with or likely to arise upon them.

The 4th section of the statute enacts "That *no action shall be brought* 29 Car. 2, c. 3, s. 4.

— whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate;

— or, whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person;

— or, to charge any person—upon any agreement made upon consideration of marriage;

—or, upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them;

—or, upon any agreement that is not to be performed within the space of one year from the making thereof;

unless the *agreement* upon which such action shall be brought, *or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith* or some other person thereunto by him lawfully authorised."

Now, looking at the above section, it will be found to enumerate *five* distinct classes of contracts, in regard to each of which it is enacted, that *no action shall be brought* unless the *agreement* which is the foundation of such action, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or his duly authorised agent. It becomes, then, very material, in limine, to consider what may be the meaning of the word "agreement" just used. It has been formally decided, that

Meaning of word "agreement" there used.

this word "agreement" must be understood in its strict legal sense as including not merely the terms of the contract, but likewise the *consideration* upon which it is founded. Upon this subject the case of *Wain* v. *Warlters* (*m*) is the leading authority. There Lord *Ellenborough*, C. J., observes, that "it seems necessary for effectuating the object of the statute, that the consideration should be set down in writing as well as the promise; for otherwise the consideration might be illegal, or the promise might have been made upon a condition precedent, which the party charged may not afterwards be able to prove, the omission of which would materially vary the promise by turning that into an absolute promise which was only a conditional one: and then it would rest altogether on the conscience of the witness to assign another consideration in the one case, or to drop the condition in the other, and thus to introduce the very frauds and perjuries which it was the object of the Act to exclude by requiring that the *agreement* should be reduced into writing by which the *consideration* as well as the *promise* would be rendered certain."

The expressions thus made use of by Lord *Ellenborough* in *Wain* v. *Warlters* have been repeatedly sanctioned by the Courts (*o*). "There is no doubt," says *Coleridge*, J., (*p*) (speaking with reference to a guarantie, an instrument which falls within the operation of the section now under notice,) "as to the general rule which results from putting together *Wain* v. *Warlters* and *Stadt* v. *Lill* (*q*). There must be

(*m*) 5 East, 10, and 2 Smith L. C. 147.

(*o*) Numerous cases upon the point in question are collected in a note (*b*) to *French* v. *French*, 2 M. & Gr. 649; of which see particularly *Jenkins* v. *Reynolds*, 3 B. & B. 14, 20, and *Saunders* v. *Wakefield*, 4 B. & Ald. 595, 600.

(*p*) *Bainbridge* v. *Wade*, 16 Q. B. 99, 100; *Caballero* v. *Slater*, 14 C. B. 300.

(*q*) 9 East, 348.

an agreement or a memorandum of one to satisfy the Statute of Frauds; and the consideration is part of the agreement; it must, therefore, appear on the instrument, either in express terms or by implication such as to leave no ambiguity. It is not to be supplied by extrinsic evidence, that is one rule. But there is another rule, that you may explain the meaning of the words used by any legal means." Various cases, to be presently noticed in connexion with the subject of guaranties, and many decisions collected in the Fourth Chapter of this Book, will be found to explain and illustrate the rules of evidence which are here adverted to by the learned judge.

The word "*agreement*" then, occurring in the 4th section of the Statute of Frauds, will be satisfied by a writing which states the *subject-matter* of the contract and the *consideration* upon which it is founded (*s*). Several documents moreover, which on the face of them are connected together by reference or otherwise, may be put in evidence as constituting an agreement or a memorandum or note thereof, sufficient within the statute. Upon the point now adverted to, *Boydell* v. *Drummond* (*t*) is a leading authority, and the principle there acted upon has in many other cases been recognised (*u*).

The written agreement required under the 4th section of the Statute of Frauds need be signed by "the party to be charged therewith" *only* (*v*). In *Laythoarp* v. *Bryant* (*x*),

(*s*) Per *Tindal*, C. J., *Laythoarp* v. *Bryant*, 2 Bing. N. C. 744; *Roberts* v. *Tucker*, 3 Exch. 632; *Sweet* v. *Lee*, 3 M. & Gr. 452.

(*t*) 11 East, 142.

(*u*) *Saunderson* v. *Jackson*, 2 B. & P. 238, and cases cited Id. (*a*); *Dobell* v. *Hutchinson*, 3 Ad. & E. 355, 371; *Jackson* v. *Lowe*, 1 Bing. 9; *Phillimore* v. *Barry*, 1 Camp. 513; *Hammersley* v. *Baron de Biel*, 12 Cl. & F. 45; *Coldham* v. *Showler*, 3 C. B. 312; *Johnson* v. *Dodgson*, 2 M. & W. 653; *Allen* v. *Bennet*, 3 Taunt. 175.

(*v*) As to signing *by an agent* see the remarks in connexion with s. 17, post.

(*x*) 2 Bing. N. C. 735.

the vendor of leasehold premises who had *not* signed the memorandum of sale was held entitled to sue the purchaser who had signed it, the words of the 4th section of the statute being deemed explicit, and being thought to afford a ready answer to the argument founded on 'want of mutuality' (*y*). "It is said," observed *Tindal*, C. J., in the case just mentioned, that, "unless the defendant signs, there is a want of mutuality. Whose fault is that? The defendant might have required the vendor's signature to the contract; but *the object of the statute was to secure the defendant's.*" This object will be fulfilled, and the requirements of the statute will be satisfied by a letter containing the terms of the agreement, written and signed by 'the party to be charged' on the contract, although such letter be addressed not to the plaintiff himself but to some third person (*z*).

Let us now consider for a moment what consequences will result from a non-compliance with the requirements contained in the concluding portion of the 4th section of the Act. To satisfy ourselves with regard to these consequences we must look at the introductory part of the same section, which says, that "*no action shall be brought*" in any of the various cases subsequently specified, unless the directions of the legislature have been complied with; but it does *not* say, that, in the event of non-compliance therewith, the contract itself shall be *void;* and the distinction here suggested may sometimes be material. An action, for instance, will not lie in our Courts upon an oral agreement made in France, and valid according to the law of that country, but falling within the 4th section of the Statute of Frauds, inasmuch as that section relates *ad litis ordinationem*, to the mode of procedure. Had it related *ad litis*

(*y*) Ante, p. 310.

(*z*) *Lerour* v. *Brown*, 12 C. B 822, 825, 827; *Bateman* v. *Phillips*, 15 East, 272; 1 Sugd. V. & P. 14th ed. 122.

decisionem, to the rights and merit of the contract itself, an action would have been maintainable on the oral agreement in question, because, in accordance with a well-known rule (*a*), the validity of a contract is, in general, to be determined by reference to the *lex loci contractûs* (*b*).

Bearing in mind the preceding observations, let us now make some inquiry respecting each of the five specific clauses into which the 4th section of the Statute of Frauds is divisible; and, first, as to "any special promise" by an executor or administrator "to answer damages out of his own estate." In order that an action may be maintainable against the personal representative upon such a promise, a writing signed by him or his agent must be produced in evidence, containing the promise, and disclosing—not necessarily in express terms, but at all events by its tenor—the consideration upon which the promise is founded (*c*). A proposal made and accepted in writing, which was not intended to operate as an unqualified promise, but to form a part only of a suggested arrangement which was not, in its entirety, acquiesced in by the other party, will not satisfy the statute (*d*). Where the plaintiff declared in assumpsit, that the defendant's testator was indebted to a third party, who after the testator's death assigned the debt to the plaintiff, and appointed him to receive it to his own use;

Promise by executor, &c. to answer damages personally.

(*a*) Certain important exceptions to this rule are specified in Story's Confl. L. 3rd ed. pp. 370 et seq.

(*b*) *Leroux* v. *Brown*, 12 C. B. 801. As to the effect of that part of the 4th section of the Statute of Frauds considered in the text, see *Griffith* v. *Young*, 12 East, 513; per *Tindal*, C. J., *Sweet* v. *Lee*, 4 Scott N. R. 90.

(*c*) *Rann* v. *Hughes*, 7 T. R 350, n.; *S. C.*, 4 Bro. P. C. 27; 2 Wms. Ex. 4th ed. p. 1519.

"The common law requires that there should be a sufficient consideration to support the promise; and the statute adds a still further requisite, namely, that the promise should be in writing:" 1 Wms. Saund. 211, (2).

(*d*) *Hamilton* v. *Terry*, 11 C.B. 954.

and that the defendant, in consideration that the plaintiff would accept the defendant as his debtor, promised to pay it to the plaintiff; the consideration alleged was held to be insufficient to support the promise, so as to charge the defendant personally (*e*). If, however, in this case the promise had been in consideration of forbearance by the assignee of the debt to sue the executor, that would have been a valid consideration in law (*f*).

Promise to answer for debt, &c. of another.

The second clause of the 4th section of the Statute of Frauds concerns "any special promise to answer for the debt, default, or miscarriages of another person." Reading this clause in connexion with the introductory and concluding portions of the section named, and keeping in mind the remarks with reference to them already made, we conclude that an action will not lie upon such a promise unless the names of the contracting parties, the promise itself, and the consideration for it (all which particulars are included under the term "agreement" used in the Act) (*g*) be "in writing, signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

Of guarantie.

A guarantie then, which is, in fact, a promise to answer for the payment of some debt, or the performance of some duty, in the event of the failure of another person who is in the first instance liable for such payment or performance (*h*), must, in order that an action may lie upon it, be in writing (*i*).

The form of a guarantie, which is an instrument of common use in the mercantile world, when properly worded with reference to the requirements of the statute law may

(*e*) *Forth* v. *Stanton*, 1 Saund. 210. See *Nelson* v. *Serle*, 4 M. & W. 795.

(*f*) 1 Wms. Saund. 6th ed. 209 *a*, (1).

(*g*) Ante, p. 384; *Bassell* v. *Trussell*, 4 Taunt. 117.

(*h*) See Fell on Guar. 2nd ed. p. 1; 3 Kent Comm. 7th ed. p. 160.

(*i*) See *Fish* v. *Hutchinson*, 2 Wils. 94; *Chater* v. *Beckett*, 7 T. R. 201.

be as follows:—"London, the —— of —— 18—. In consideration that Mr. C. D. will (*or* 'has *at my request*' (*j*)) [*here state the consideration for which the guarantie is given*], I do hereby guarantie to him the said Mr. C. D. [*here state the sum or thing guarantied*]. This guarantie is to continue in force for the period of —— and no longer (*k*). (Signed) A. B. To Mr. C. D."

Such being the form of a properly worded guarantie, I now propose to notice certain points of difficulty likely to occur in connexion with it; and having done so, I will direct attention to various questions which have arisen in regard to the applicability of the Statute of Frauds under special circumstances to contracts of indemnity.

In the first place, then, the consideration for the promise to indemnify must be sufficient at common law; and it must, in order to comply with the statute, be sufficiently stated upon the guarantie itself, or upon documents which are connected with it in writing, and which consequently may be looked at to explain its meaning (*l*). It may be proper also to observe in this place, that, inasmuch as the 4th section of the Statute of Frauds does not require the contract itself to be in writing but a memorandum of it, and as a memorandum, properly signed, of a by-gone contract is sufficient to satisfy the Act, if words be introduced into a

(*j*) These words should be inserted when the consideration is past and executed at the date of the instrument.

(*k*) A guarantie *relating to the sale of goods* need not be stamped. Fell on Guar. p. 69; Tilsley Stamp Acts, 2nd ed., p. 48.

As to the above form, see Smith's M. L. 4th ed. p. 412, (*a*). The intention of the guarantor with regard to the period during which the guarantie is to be in force should be clearly expressed, otherwise embarrassing questions of construction may arise. See the remarks on this subject, Id. Chap. xi. s. 2.

(*l*) *Colbourn* v. *Dawson*, 10 C. B. 765; *Brettel* v. *Williams*, 4 Exch. 623; ante, p. 385. See *Emmott* v. *Kearns*, 5 Bing. N. C. 559.

paper signed by "the party to be charged;" or if an alteration be made in it, the addition or alteration thus made may be considered as authenticated by the signature already on the instrument, provided it be plain that it was meant to be so authenticated (*m*).

The sufficiency of the consideration of a guarantie at common law may be determined in conformity with the general remarks touching the 'consideration for a promise' made in the preceding chapter (*n*). When it may be said to be sufficiently stated under the statute will be collected from the following cases, and especially from the remarks of *Tindal*, C. J., in *Hawes* v. *Armstrong* (*o*), where that learned judge says, that it is not necessary that the consideration should appear in express terms on the face of the guarantie, it will be sufficient in any case if the memorandum is so framed that any person of ordinary capacity must infer from the perusal of it, that the consideration alleged by the plaintiff and no other was that upon which the undertaking was given. Not that a mere conjecture, however plausible, as to the identity of the consideration stated in the declaration with that intended by the memorandum would be sufficient to satisfy the statute. There must be a well-grounded inference, to be necessarily collected from the terms of the memorandum, that the consideration alleged, and no other than such consideration, was intended by the parties to be the ground of the promise.

Let us illustrate the above remarks by a few examples:—In *Lysaght* v. *Walker* (*p*), decided in the House of Lords, the guarantie was, so far as its wording is material for the present inquiry, as follows:—"Entertaining the highest

(*m*) *Bluck* v. *Gompertz*, 7 Exch. 862.

(*n*) Ante, p. 322.

(*o*) 1 Bing. N. C. 761, per Lord *Denman*, C. J., 8 A. & E. 855-6. See *Cole* v. *Dyer*, 1 C. & J. 461.

(*p*) 5 Bligh N. S. 1.

opinion of Mr. C.'s integrity of character as well as propriety of conduct, we therefore hold ourselves responsible to you in the sum of 500*l.* sterling for his discharging faithfully and honestly any duty assigned to or trust reposed in him, and we are ready to execute bonds to that effect, and for that or any larger amount that may be necessary, whenever you require it." It appeared, that, at the time when the above letter was written, C. had no situation or employment under the plaintiffs (defendants in error), and the above expressions were held tantamount to an undertaking of this kind:—"If you (the plaintiffs) will employ C., we (the defendants) will guarantie his fidelity."

In *Kennaway* v. *Treleavan*(*q*) the guarantie was in these terms:—"I hereby guarantie to you Messrs. K. & Co. the sum of 250*l.*, in case Mr. P., of &c., should default in his capacity of agent and traveller to you." It was held that a sufficient consideration appeared on the face of this instrument, viz. the future employment of P. as agent and traveller of the plaintiffs.

In *Price* v. *Richardson*(*r*), on the other hand, no consideration was held to appear on the following guarantie:—"Mr. P., I will see you paid for 5*l.* or 10*l.* worth of leather on the 6th of December for T. L., shoemaker." "It is impossible," said *Parke*, B., "to collect from the terms of this guarantie what was the real consideration for the defendant's promise." So, in *Wain* v. *Warlters*(*s*), the following was held to be a defective guarantie, on the ground that it shewed no consideration:—"Messrs. W. & Co., I will engage to pay you by half-past four this day 56*l.* and expenses

(*q*) 5 M. & W. 498; *Newbury* v. *Armstrong*, 6 Bing. 201; *Ryde* v. *Curtis*, 8 D. & R. 62; *Emmott* v. *Kearns*, 5 Bing. N. C. 559.

(*r*) 15 M. & W. 539.

(*s*) 5 East, 10; *Jenkins* v. *Reynolds*, 3 B. & B. 14; *Bentham* v. *Cooper*, 5 M. & W. 621.

on bill that amount on H." Both these latter cases accordingly illustrate the remark of Lord *Ellenborough*, C. J., in *Wain* v. *Warlters*, that the Statute of Frauds "never meant to enforce any promise which was before invalid, merely because it was put in writing."

The rule, then, is perfectly settled, as remarked by *Parke*, B., in *Jarvis* v. *Wilkins*(*t*), that the consideration must appear upon the face of the instrument itself *either in express terms or by necessary implication.*

Again—inasmuch as a past consideration, unless moved by a previous request, is insufficient to support a parol promise(*u*), it will in practice frequently be requisite to look narrowly at the wording of a guarantie, with a view to determining whether in fact it has reference to a past or to a contemporaneous or future act on the part of the person to whom the guarantie is given. A guarantie in these terms, "I hereby guarantie Mr. J.'s account with you for wines and spirits to the amount of 100*l.*," was held to be bad, as an undertaking to be answerable merely for some *existing* account(*x*). In this case it moreover appeared in evidence that there was such an account open between the plaintiffs and J. at the date of the guarantie(*y*).

The case of *Tanner* v. *Moore*(*z*) may in the next place be cited as bearing upon the precise point before us in reference to the construction of a guarantie. There the declaration, which was in assumpsit, stated that T. had commenced an action against M. for 165*l.*, and that, in consider-

(*t*) 7 M. & W. 410, 412; *James* v. *Williams*, 5 B. & Ad. 1109; *White* v. *Woodward*, 5 C. B. 810; *Raikes* v. *Todd*, 8 A. & E. 846, 855; *Caballero* v. *Slater*, 14 C. B. 300.

(*u*) As to this rule and its qualifications, see ante, p. 314.

(*x*) *Allnutt* v. *Ashenden*, 5 M. & Gr. 392.

(*y*) As to the admissibility of extrinsic evidence in such a case, see post, p. 394.

(*z*) 9 Q. B. 1. See *Payne* v. *Wilson*, 7 B. & C. 423.

ation of T.'s "agreeing to stay the said action," the defendant promised to pay T. the said amount. By the agreement put in evidence, it appeared that the defendant had promised, in consideration of the plaintiff's "having agreed to stay" proceedings; and, on the objection being taken that a variance existed between the proof and the declaration, the Court held the meaning of the two expressions to be in truth the same: "for it would be absurd to suppose that the defendant bound himself to pay the money in consideration of the plaintiff merely having at a past time agreed to stay the proceedings, unless that agreement was *continuing* at the time of the signing of the instrument and until the action was actually stayed."

In *Goldshede* v. *Swan* (*a*), the action was brought on a guarantie thus worded: "In consideration of your *having this day advanced*" to A. B. a certain sum, we hereby "undertake to pay the same" on default; and the question was, whether the words "*having this day advanced*," so necessarily implied a past consideration (which would be insufficient to support the promise) that explanatory evidence as to their meaning was inadmissible. The Court, however, thought that the words in question were fairly susceptible of either of two meanings—as pointing to a past *or* to a future transaction; and that extrinsic evidence might therefore be given for the purpose not of contradicting the instrument in question, but of explaining its meaning. The foregoing case shews, then, that Courts of law will by no means incline against the validity of a guarantie, but will, on the contrary, oppose themselves to a pernicious strictness and technicality in interpreting it (*b*).

(*a*) 1 Exch. 154; *Bainbridge* v. *Wade*, 16 Q. B. 89; *Steele* v. *Hoe*, 14 Q. B. 431; *Colbourn* v. *Dawson*, 10 C. B. 765; *Edwards* v. *Jevons*, 8 C. B. 436; *Brooks* v. *Haigh*, 10 A. & E. 323; *S. C.*, Id. 309.

(*b*) See also per *Wilde*, C. J., 8 C. B. 444.

It seems, indeed, now clearly established, that the true meaning of words used in a guarantie may be ascertained by reference to the surrounding circumstances, so that where its language admits of being understood as referring either to a past or to a future consideration, the plaintiff may set forth in his declaration facts tending to shew that the latter is the true meaning of the instrument. Should he do so, and an issue of law be raised as to the sufficiency of the guarantie, the Court will, if necessary, look at the facts set forth on the one side and admitted on the other, in order to enable themselves to construe it, precisely as in the case of a will extrinsic evidence of the circumstances of the testator's family may be adduced, in order to give to the instrument in question a construction which it would not otherwise necessarily bear (*c*).

In *Bell* v. *Welch* (*d*), a guarantie given by the defendants to the plaintiff (the public officer of a banking company) was in these terms: "We, the undersigned, hereby indemnify the National Provincial Bank of England to the extent of 1000*l.*, *advanced or to be advanced*" to P. It appeared that at the time the guarantie was given P. was indebted to the bank in a sum *exceeding* 1000*l.*; and the Court held, that, whether the instrument above set out were construed by its terms or with reference to the surrounding circumstances, no sufficient consideration appeared for the defendant's promise.

The case below cited serves to shew that a guarantie given, in consideration of advances already made and to be made in future, to pay such advances will be good (*e*). And

(*c*) *Bainbridge* v. *Wade*, 16 Q. B. 89; *Edwards* v. *Jevons*, 8 C. B. 436; *Colbourn* v. *Dawson*, 10 C. B. 765; *Brooks* v. *Haigh*, 10 A. & E. 323, 334; *S. C.*, Id. 309; *Johnston* v. *Nicholls*, 1 C. B. 251; *Shortrede* v. *Cheek*, 1 A. & E. 57, 61.

(*d*) 9 C. B. 154.

(*e*) *Chapman* v. *Sutton*, 2 C. B. 634; per *Maule*, J., Id. 643.

if the consideration be altogether executory, and therefore unexceptionable, such a consideration will support a promise to pay for past as well as future advances(*f*).

Let us in the next place briefly consider what cases are within, and what are excluded from, the operation of that particular clause of the Statute of Frauds, the effect whereof we have been discussing. The clause in question applies where the object of the party seeking to avail himself of the guarantie is to charge the defendant upon his promise "to answer for the debt, default, or miscarriages of *another*." It has, therefore, no application where the evidence adduced discloses a direct liability attaching to the *guarantor*(*g*), or an absolute transfer of liability to him from the original debtor. Where the individual whose debt is said to have been guarantied ceases altogether upon the so-called guarantie being given to be liable, there the transaction in question is not one which requires to be evidenced by writing within the Statute of Frauds. In *Birkmyr* v. *Darnell*(*h*), the distinction between a direct and a collateral liability is thus illustrated by the Court: "If," they say, "two come to a shop, and one buys, and the other, to gain him credit, promises the seller, 'If he does not pay you I will,' this is a collateral undertaking, and void without writing by the Statute of Frauds. But if he says, 'Let

(*f*) *Boyd* v. *Moyle*, 2 C. B. 644; *White* v. *Woodward*, 5 C. B. 810, 816; *S. C.*, 4 C. B. 752; *Johnston* v. *Nicholls*, 1 C. B. 251, 268; per *Parke*, B., 5 M. & W. 501. See *Wood* v. *Benson*, 2 C. & J. 94.

(*g*) *Forth* v *Stanton*, 1 Wms. Saund. 211 *b*; *Macrory* v. *Scott*, 5 Exch. 907, citing *Castling* v. *Aubert*, 2 East, 325.

(*h*) Salk. 27, and 1 Smith L. C. 134; *Tomlinson* v. *Gell*, 6 A. & E. 564; *Butcher* v. *Stewart*, 11 M. & W. 857; *Goodman* v. *Chase*, 1 B. & Ald. 297; *Bird* v. *Gammon*, 3 Bing. N. C. 889; *Browning* v. *Stallard*, 5 Taunt. 450; *Andrews* v. *Smith*, 2 Cr. M. & R. 627; *Dixon* v. *Hatfield*, 2 Bing. 439; *Lane* v. *Burghart*, 1 Q. B. 933.

him have the goods, I will see you paid,' this is an undertaking as for himself, and he shall be intended to be the very buyer, and the other to act but as his servant." It should be observed, that the cases here put by the Court are meant as examples merely, and by way of shewing that the surrounding circumstances must be looked at, with a view to determining whether a particular transaction does or does not amount to a guarantie within the Statute of Frauds. The question will in truth be one of fact, as may be seen by comparing the case of *Matson* v. *Wharam* (*i*) with that of *Birkmyr* v. *Darnell* just cited.

The subject before us is very clearly explained in the notes to Wms. Saund. (*k*), where it is said that the subject of inquiry at Nisi Prius very often is—to whom was credit given? and such nice distinctions have been taken on the wording of the promise as to make it impossible to lay down any precise rule of construction with reference to it; but the jury must determine to whom the credit was given. If it appears that the credit was given to the defendant—that is, if the goods, &c., were really sold to him, the statute then cannot apply. But if it appears that the person for whose use the goods were furnished is liable, and a sufficient promise in writing by the defendant to pay the debt is produced, the plaintiff will then be entitled to recover, if he declare specially upon the promise in question as collateral (*l*).

Such being the general mode of determining whether a case is or is not within the statute, it may be well to specify the following states of facts, in which it has been held or intimated by the Court that the statute would not apply:—

(*i*) 2 T. R. 80.

(*k*) 1 Wms. Saund. 6th ed. 211 *b*.

(*l*) 1 Wms. Saund. 6th ed. 211 *c*; *Green* v. *Cresswell*, 10 A. & E. 453, 459.

1. If A. agree to accept C., a debtor of B., as his debtor in lieu of B., such an arrangement clearly involves a transfer of liability from B. to C., and is very different from a guarantie by C. as *surety* of B.'s debt to A.(*m*): here consequently the statute does not apply.

2. The statute applies only to promises made to the person to whom another is already or is to become answerable. It must be a promise to be answerable for a debt of or a default in some duty by that other person *towards the promisee*(*n*).

3. If A. undertake to B. that C. shall do a particular thing, no privity existing between B. and C., the liability assumed by A. will be direct, and not collateral(*o*).

4. Where, in consideration of a del credere commission, A. undertakes to be responsible to B. for due payment of the purchase money of goods to be sold through the agency of A., this undertaking does not fall within the statute, and need not be in writing(*p*); for, though the engagement thus entered into by A. *may* terminate in a liability to pay the debt of another, that is not the *immediate* object for which the consideration is given(*q*).

The clause before us applies, however, to promises to answer for the tortious default or miscarriage of another as well as for his breach of contract; and accordingly, where A. had, without leave, ridden the plaintiff's horse and caused his death, a promise by the defendant to pay the plaintiff the damage which he had sustained, in consideration of the

(*m*) Judgm. *Gull* v. *Lindsay*, 4 Exch. 52.

(*n*) *Hargreaves* v. *Parsons*, 13 M. & W. 561, 570.

(*o*) *Hargreaves* v. *Parsons*, supra.

(*p*) *Couturier* v. *Hastie*, 8 Exch. 40; the judgment in which case was reversed in error on a point other than that mentioned in the text: see *Hastie* v. *Couturier*, 9 Exch. 102. See *Re Willis*, 4 Exch. 530.

(*q*) Judgm. 8 Exch. 55, 56.

plaintiff forbearing to sue A., was held to be void because not in writing(*r*).

The policy of the particular clause of the Statute of Frauds under consideration, obviously was to prevent that fraud and perjury which had been found by experience or was thought likely to arise from trusting to evidence of less authority than that of a written document, for fixing upon a defendant the responsibility for the debt, default, or miscarriage for which another person was primarily liable(*s*). The clause in question seems to have successfully accomplished its object until a mode was discovered of evading it by shaping the demand, not upon a *special promise* of the defendant, which is within the letter of the statute, but, upon a *tort* or *wrong* done to the plaintiff by some false or fraudulent representation of the defendant, made in order to induce him (the plaintiff) to contract with some third party; evidence of such representation when oral only, and insufficient therefore by reason of the statute to support an action ex contractu, being relied upon to sustain an action on the case(*t*).

It was to remedy the inconvenience resulting from the frequency of actions framed in the manner just described, of which *Pasley* v. *Freeman*(*u*) offers the first reported example, that Lord *Tenterden* introduced into the stat. 9 Geo. 4, c. 14, its 6th section, which enacts, that "no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent

Stat. 9 Geo. 4, c. 14, s 6.

(*r*) 1 Wms. Saund. 6th ed. 211 *c*, (1), citing *Kirkham* v. *Marter*, 2 B. & Ald. 613.

(*s*) Per Lord *Abinger*, C. B., 1 M. & W. 117.

(*t*) See, per *Parke*, B., 1 M. & W. 114; 1 Smith L. C. 79.

(*u*) 3 T. R. 51, and 2 Smith L. C. 55.

or purpose that such other person may obtain credit, money, or goods upon (*v*), unless such representation or assurance be made in writing, signed by the party to be charged therewith."

The general scope of the foregoing section, and especially the precise meaning which should be assigned to the word "ability" therein used, were much discussed in the case of *Lyde* v. *Barnard* (*x*), to which, as the point there raised was not finally determined, owing to a difference of opinion amongst the members of the Court, and yet remains unsettled, a bare reference will here suffice (*y*). Assuming, however that an agreement really falls within that part of the 4th section of the Statute of Frauds latterly considered, or within the 6th section of Lord *Tenterden's* Act, and must therefore be in writing, one thing is quite clear, viz. that when so written it cannot afterwards be varied or altered orally, for otherwise the intentions of the legislature might manifestly be thwarted. This is a principle to which I have already had occasion to refer, and which is recognised in equity as well as at law, as will be seen by looking at the judgment in *Emmet* v. *Dewhurst* (*z*), where several authorities bearing upon the subject before us are collected.

Agreement made upon consideration of marriage.

The third clause of the 4th section of the Statute of Frauds has reference to "any agreement made upon consideration of marriage." It may be dismissed with the remark, that these words do not apply to a promise to

(*v*) As to the error here apparent in the wording of the Act, see 1 M. & W. 104, 110, 115, 123.

(*x*) 1 M. & W. 101.

(*y*) The statute was held to apply in *Swann* v. *Phillips*, 8 A. & E. 457; *Haslock* v. *Fergusson*, 7 A. & E. 86; *Devaux* v. *Steinkeller*, 6 Bing. N. C. 84. See *Turnley* v. *Macgregor*, 6 M. & Gr. 46.

(*z*) 3 Mac. & G. 587, 596.

marry(*a*), but merely to contracts for the performance of collateral acts in consideration of marriage(*b*).

Contract concerning land, &c.

Passing on then to the next clause, which concerns actions brought to charge any person "upon any contract *or*(*c*) sale of lands, tenements, or hereditaments, or any interest in or concerning them." It has been observed, that the words "lands, tenements, or hereditaments" here used, seem to have been intended by the legislature as equivalent to 'fee simple;' and the words "any interest in or concerning them" seem to have been used to denote a chattel interest, or some interest less than the fee simple(*d*). In regard to the true meaning of these latter words doubt has not unfrequently been felt. What is an interest in or concerning land? What is 'a contract of an interest in lands'(*e*)? To these questions conflicting answers have, under special circumstances, been given; but, nevertheless, the principles which are to guide us in replying to them are now very definitely ascertained. Little hesitation need be felt in affirming that an agreement to convey an equity of redemption(*f*); a contract under which the plaintiff, in consideration of a sum of money, agrees to surrender his tenancy, and to procure the defendant to be accepted in his place(*g*); a contract to let furnished lodgings(*h*); or, an agreement

(*a*) *Cork* v. *Baker*, 1 Str. 34; *Harrison* v. *Cage*, 1 Ld. Raym. 386, ad fin.; Bull. N. P. 7th ed. 280, c.

(*b*) See *Montacute* v. *Maxwell*, 1 P. Wms. 618; *S. C.*, Prec. Chanc. 526; *Hammersley* v. *De Biel*, 12 Cl. & F. 45, cited *Lassence* v. *Tierney*, 1 Mac. & G. 571, 572.

(*c*) The word "of" was here probably intended.

(*d*) Per *Littledale*, J., *Evans* v. *Roberts*, 5 B. & C. 839, and in *Smith* v. *Surman*, 9 B. & C. 573.

(*e*) See per *Bayley*, B., 1 C. & J. 397.

(*f*) *Massey* v. *Johnson*, 1 Exch. 241.

(*g*) *Cocking* v. *Ward*, 1 C. B. 858, followed in *Kelly* v. *Webster*, 12 C. B. 283.

(*h*) *Edge* v. *Strafford*, 1 C. & J. 391; *Inman* v. *Stamp*, 1 Stark. N. P. C. 12.

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for a future lease of land (*i*); or, a contract whereby the plaintiff agrees to let a house to the defendant, to sell him certain furniture and fixtures therewith, and to make certain alterations and improvements therein, the defendant on his part agreeing to take the house and to pay for the furniture, fixtures, and alterations—is within the statute (*j*). So, where A., being possessed of a messuage and premises for the residue of a term of years, agreed with B. to relinquish possession to him, and to suffer him to become tenant of the premises for the residue of the term, in consideration of B.'s paying a sum of money towards the dilapidations, this was held to be within the Act (*k*). Where, indeed, anything is done which substantially amounts to a parting with an interest in land, or which *relates* to the sale of such an interest, the agreement is within the statute (*l*).

Let us now turn for a moment to notice a class of cases differing somewhat from the above, and presenting greater difficulty, viz. those which concern things annexed to land and falling within the operation of a well-known maxim *quicquid plantatur solo solo cedit*,—whatever is affixed to

(*i*) *Foquet* v. *Moor*, 7 Exch. 870.

(*j*) *Vaughan* v. *Hancock*, 3 C. B. 766; *Mechelen* v. *Wallace*, 7 Ad. & E. 49; *Earl of Falmouth* v. *Thomas*, 1 C. & M. 89.

(*k*) *Buttemere* v. *Hayes*, 5 M. & W. 456.

(*l*) Per *Maule*, J., *Kelly* v. *Webster*, 12 C. B. 289, 290.

But if the transfer of an interest in land be effected, and the transferee admits to the transferor that he owes him the stipulated price, the amount in question may be recovered in a count upon an account stated: *Cocking* v. *Ward*, 1 C. B. 858; and see the cases cited arg. 12 C. B. 287--9; *Teall* v. *Auty*, 4 Moore, 542.

A contract for investigating the title to land has been held not to be within the statute: *Jeakes* v. *White*, 6 Exch. 873. Nor is a contract for the sale of shares in a railway company, *Bradley* v. *Holdsworth*, 3 M. & W. 422; or in a waterworks company, *Bligh* v. *Brent*, 2 Y. & C. 268; or in a mining company conducted on the cost-book principle, *Watson* v. *Spratley*, Exch., July 7, 1854.

Goss v. *Lord Nugent*, 5 B. & Ad 58, which shews that a written contract for the sale of land cannot be *varied orally*, is cited post

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the soil becomes in contemplation of law a part of it and subjected to the same incidents as the soil itself. Under this sub-division of my subject, I shall speak, first, of the growing produce of land, such as crops, fruit, and the like; secondly, of fixtures.

Now, it is to be observed that Lord *Coke* carefully distinguishes between land and the growing produce of the land. Upon the death of tenant for life, he says (*m*), although the land belongs to the reversioner, the growing crop goes to the executor of the tenant for life as part of his personal estate. So, if a man be seised of land in right of his wife, and sow the ground, and die, his executors shall have the corn; and if his wife die before him, he shall have it; for, although upon the death of the husband or wife the interest of the former in the land ceases, yet the growing corn is considered as part of his personal estate, and belongs to him or his executors. In these cases, Lord *Coke* considers the growing produce of the land as a personal chattel independent of and distinct from the land itself. And, reasoning by analogy to what is here said, our Courts have held, that a sale of any growing produce of the earth (reared by labour and expense), in actual existence at the time of the contract, whether it be in a state of maturity or not, is to be considered not as a sale of an interest in or concerning land within the meaning of the 4th section of the Statute of Frauds, but rather as a contract for the sale of goods wares and merchandises within the 17th section of the Act (*n*).

A contract, accordingly, for the sale of growing potatoes, which come within the description of emblements, and are deemed chattels by reason of their being raised by labour

(*m*) Co. Litt. 55. b.

(*n*) *Evans* v. *Roberts*, 5 B. & C. 840--1; Judgm. 10 A. & E. 758; per *Hullock*, B., 1 Y. & J. 308; 1 Wms. Saunds. 6th edit. 277 *c*.

and manurance, is not required to be in writing (*o*), whereas growing grass does not come within the description of goods and chattels, it goes to the heir and not to the executor, and cannot be taken under a fi. fa. (*p*); and these latter remarks are also applicable to growing fruit (*q*) and to growing trees (*r*), unless, indeed, it clearly appear from the terms or nature of the particular contract, that the parties to it were dealing exclusively with the *produce* of the trees when they should be cut down and severed from the freehold (*s*).

Tenants' fixtures attached to (but not *parcel of*) the freehold (*t*) bear a very strong resemblance, it has been observed (*u*), to those growing crops which are not the spontaneous produce of the earth, but are raised by the labour and expense of the occupier of the land: even whilst thus attached they may be treated for some purposes as chattels (*v*); for instance, in most cases they may be seized and sold under a fi. fa. (*x*), and will go in like manner as crops of corn or other *fructus industriales* to the executor (*y*).

(*o*) *Evans* v. *Roberts*, 5 B. & C. 829; *Warwick* v. *Bruce*, 2 M. & G. 205; *Sainsbury* v. *Matthews*, 4 M. & W. 343; *Jones* v. *Flint*, 10 Ad. & E. 753; *Parker* v. *Staniland*, 11 East, 362.

(*p*) *Crosby* v. *Wadsworth*, 6 East, 602; *Carrington* v. *Roots*, 2 M. & W. 248; *Jones* v. *Flint*, 10 Ad. & E. 753.

(*q*) *Rodwell* v. *Phillips*, 9 M. & W. 501.

(*r*) *Scorell* v. *Boxall*, 1 Y. & J. 396; Com. Dig. Biens (H); *Teall* v. *Auty*, 4 Moore, 542.

(*s*) *Smith* v. *Surman*, 9 B. & C. 561. See *Watts* v. *Friend*, 10 B. & C. 446.

(*t*) As to the various meanings of the word "fixtures" see Judgm. *Wiltshear* v. *Cottrell*, 1 E. & B. 690. The test by which to distinguish between tenant's and landlord's fixtures is specified in the Judgm. *Hellawell* v. *Eastwood*, 6 Exch. 312.

(*u*) Per *Littledale*, J., 5 B. & C. 841.

(*v*) Judgm. 1 C. M. & R. 275.

(*x*) *Poole's case*, 1 Salk. 368. Per *Parke*, B., *Horsfall* v. *Hey*, 2 Exch. 779; *Hellawell* v. *Eastwood*, 6 Exch. 295; Amos & F. on Fixt. 2nd edit. pp. 321 et seq.

(*y*) Amos & F. on Fixt. 2nd edit. p. 180.

On the other hand, trover will not lie for tenants' fixtures before severance(*z*), nor can they be treated as goods sold and delivered in an action for their price(*a*). They are, indeed, of a somewhat anomalous character, and whether or not they fall within the operation of the Statute of Frauds does not appear on any occasion to have been fully and satsifactorily determined. It is clear, that a contract concerning an interest in *land and fixtures* must be in writing(*b*); but, when things annexed to the freehold are sold in contemplation of an immediate severance, and the contract does not transfer any interest whatever in the soil or freehold, ex. gr. between an outgoing tenant at the expiration of his term and the incoming tenant under a new demise, or wherever the subject of the contract is in the view of the parties a mere chattel, as where fixtures have been appraised and valued under an oral agreement for their sale, it may reasonably be contended that the Statute of Frauds does not apply(*c*).

If, however, an entire agreement be made for the sale of real and personal estate, and the agreement as to the land be within the statute and void, it cannot be supported as to the personal property which was sold with it(*d*).

Agreements not to be performed within a year.

The fifth clause of the 4th section of the Statute of Frauds relates to "any agreement that is not to be performed within the space of one year from the making thereof," the meaning of which words is explained in *Peter*

z Ruffey v. *Henderson*, 21 L. J. (Q. B.) 49; *Colegrave* v. *Dias Santos*, 2 B. & C. 76; *Minshall* v. *Lloyd*, 2 M. & W. 450; *Mackintosh* v. *Trotter*, 3 M. & W. 184, 186.

(*a*) *Lee* v. *Risdon*, 7 Taunt. 188.

(*b*) *Kelly* v. *Webster*, 12 C. B. 283.

(*c*) Amos & F. on Fixt. 2nd edit. 253; *Hallen* v. *Runder*, 1 C. M. & R. 266. See *Petrie* v. *Dawson*, 2 Car. & K. 138; *Sleddon* v. *Cruikshank*, 16 M. & W. 71.

(*d*) Sugd. Conc. V. of the Law of V. & P. p. 78, where the cases are cited; *Salmon* v. *Watson*, 4 Moore, 73.

v. *Compton* (*e*), where it was held, that, if the agreement in question is to be performed upon a contingency, but is not expressly to be performed after the year, there, inasmuch as the contingency might happen within the year a note in writing is not necessary; but *contra* where it appears by the whole tenor of the agreement that it is to be performed after the expiration of the year (*f*).

Hence a contract for the maintenance of a child, to enure 'so long as the defendant should think proper,' was held not to be within the statute (*g*); whilst, on the other hand, a contract for a year's service, *to commence at a future day*, is within the statute as being an agreement not to be performed (i. e. completely performed) within the year (*h*). Should it, moreover, appear from the nature of the contract that its performance was not contemplated within the year, the mere circumstance that it is defeasible within the year will not take it out of the operation of the statute, as shewn by *Birch* v. *Earl of Liverpool* (*i*) and *Roberts* v. *Tucker* (*k*).

It has, however, been expressly decided that the clause of the Act now under notice applies to such contracts only as are not to be performed on *either* side within the year (*l*); so that in truth the case of *Peter* v. *Compton*, to which I have already alluded, might have been decided upon a ground other than that on which the judgment actually rests, inasmuch as on looking at that case it will be seen

(*e*) Skin. 353, and 1 Smith L. C. 143; *Wells* v. *Horton*, 4 Bing. 40.

(*f*) *Peter* v. *Compton*, supra. *Boydell* v. *Drummond*, 11 East, 142, is a leading authority upon the above point. See also *M'Kay* v. *Rutherford*, 6 Moo. P. C. Cas. 413.

(*g*) *Souch* v. *Strawbridge*, 2 C. B. 808. See *Crowhurst* v. *Laverack*, 8 Exch. 208.

(*h*) *Bracegirdle* v. *Heald*, 1 B. & Ald. 722; *Snelling* v. *Lord Huntingfield*, 1 C. M. & R. 20.

(*i*) 9 B. & C. 392.

(*k*) 3 Exch. 632, 643.

(*l*) *Cherry* v. *Heming*, 4 Exch. 631, affirming *Donellan* v. *Read*, 3 B. & Ad. 899; Per *Tindal*, C. J., *Souch* v. *Strawbridge*, 2 C. B. 814.

that the contract there sued upon had in fact been executed by one of the parties to it.

Where an agreement falls within the words which we have been considering, and has been reduced into writing under the Act, it clearly cannot be *varied* by any subsequent oral contract between the parties. This proposition may be illustrated by the case of *Giraud* v. *Richmond* (*m*), where it was held, that an agreement by which the plaintiff entered into the defendant's service at a salary payable *yearly* (which agreement, from its general scope and nature, clearly fell within the Statute of Frauds,) could not be varied by evidence of a subsequent verbal agreement that the salary should be paid *quarterly*.

All contracts for the *sale of goods* when "not to be performed within the space of one year from the making thereof," are of course within the operation of that clause of the 4th section of the Statute of Frauds which has been just noticed. Contracts for the sale of goods for the price of 10*l.* or upwards fall within the words of its 17th section, which will be presently discussed. Contracts for the sale of goods at a price less than 10*l.*, to be performed within the year, are regulated by the common law. Before proceeding, then, to examine the wording and operation of the last-mentioned section of the Act, it may be convenient to lay down a few purely elementary propositions respecting the contract of sale and its effect at common law.

Contract of sale.

A contract of sale is a contract for the transfer of property in consideration of money from one man to another (*n*). It

(*m*) 2 C. B. 835; *Williams* v. *Jones*, 5 B. & C. 108.

(*n*) See 2 Kent, Comm. 7th edit. 592; 2 Bla. Comm. 446; Smith M. L. 4th edit. 430.

"A sale imports a *quid pro quo* in

may be intended to take effect *in præsenti* or *in futuro:* that is to say, it may be intended to pass the property instanter or at some future and perhaps unascertained period.

To constitute a sale which shall immediately pass the property, it is necessary that the thing sold should be certain, and that its price should be either ascertained or ascertainable(*o*).

Payment—earnest given—delivery.

If at the time of sale of specific goods the whole or part of the purchase-money is paid to the vendor, or if earnest-money, although it be but a penny, is handed over to him, or if the thing bought, or any portion thereof in the name of the whole, be delivered to the vendee, in any one of these cases the effect of the transaction which has taken place is to alter the property in the goods in question, and to transfer it from the bargainor to the bargainee(*p*). The former of these parties becoming entitled to sue for the price of the goods if wholly or in part unpaid, the latter, on tendering the residue (if any) of the purchase-money, to recover the goods themselves or the undelivered portion of them by action(*q*).

As regards the effect of giving something by way of earnest at common law, reference may be made to *Langfort* v. *Tiler*(*r*), where Lord *Holt* ruled that earnest only binds the bargain, and gives the party a right to demand the goods on tendering the residue of the purchase-money; and further, that, after earnest given, the vendor cannot sell the goods to another without a default in the vendee; and therefore, if the vendee does not come and pay and take the goods, the vendor ought to go and request him, and then, if he still

some way or other enuring to the benefit of the party selling." Per *Holroyd*, J., 4 B. & C. 246.

(*o*) *Logan* v. *Le Mesurier*, 6 Moo. P. C. Ca. 132.

(*p*) 1 Shepp. Touch. 224; 2 Bla. Comm. 447; *Hinde* v. *Whitehouse*, 7 East, 558; Noy Max. 87.

(*q*) 2 Bla. Comm. 448.

(*r*) 1 Salk. 113, cited *Hinde* v. *Whitehouse*, 7 East, 571.

makes default and does not take away the goods in convenient time, the agreement is dissolved, and he is at liberty to sell them to any other person. Much weight is doubtless due to the remarks of Lord *Holt* just cited, but nevertheless the precise nature of the rights of the unpaid vendor of goods, under circumstances such as are above supposed, does not seem on any occasion to have been fully determined, and cannot be considered even at this day as satisfactorily settled.

Delivery—whether necessary to pass the property.

Where two parties intend an immediate sale of some specific chattel, and have definitively agreed upon its price, if the vendee thereupon tenders such price in payment it is clear that the vendor will be bound, and that delivery of the chattel will not be necessary in order to pass the property therein to the vendee(*s*).

The following authorities will suffice to support the proposition just stated:—"If I sell my horse for money, I may keep him until I am paid, but I cannot have an action of debt until he be delivered; yet the property of the horse is, *by the bargain*, in the bargainee or buyer. But if he presently tender me my money and I refuse it, he may take the horse or have an action of detinue"(*t*).

Again, "if I offer money for a thing in a market or fair, and the seller agree to take my offer, and whilst I am telling the money as fast as I can, he doth sell the thing to another; or, when I have bought it, we agree that he shall keep it until I can go home to my house to fetch the money; in both these cases, especially in the first, the bargains are good, so as the seller may not sell them afterwards to another; and, upon the payment or tender and refusal

(*s*) Per *Parke*, J., *Dixon* v. *Yates*, 5 B. & Ad 340. (*t*) Noy Max. 88.

of the money agreed upon, I may take or recover the things" (*u*).

So we read in Blackstone's Commentaries (*x*), "if the vendor says the price of a beast is four pounds, and the vendee says he will give four pounds, *the bargain is struck*, and they neither of them are at liberty to be off, provided immediate possession be tendered by the other side. But if neither the money be paid nor the goods delivered, nor tender made, nor any subsequent agreement be entered into, it is no contract, and the owner may dispose of the goods as he pleases;" that is to say, the contract, even if at any moment it had been definitively concluded between the parties, must nevertheless be regarded as having been rescinded by mutual consent (*y*), so that the property in the subject-matter of the contract will not, under the circumstances here supposed, be altered.

It is clear, then, that by the law of England, which differs in this respect from the Roman law (*z*), the property in a specific chattel *may* pass without delivery. It will so pass, where, at the time of the bargain, everything is already done, which according to the intention of the parties was necessary to transfer the property (*a*). The reason of this being, that the very *appropriation* (*b*) of the chattel is equivalent to delivery by the vendor; and the assent of the vendee to take the specific chattel and to pay the price is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee (*c*).

(*u*) 1 Shepp. Touch. 225.

(*x*) Vol. 2, p. 447; Noy Max. 87.

(*y*) Smith's M. L. 4th edit. 435, where various authorities in support of this position are cited.

(*z*) Traditionibus et usucapionibus dominia rerum, non nudis pactis, transferuntur. Cod. 2. 3. 20.

(*a*) *Wait* v. *Baker*, 2 Exch. 9.

(*b*) The different senses in which the word "appropriation" here used may be understood, are specified by *Parke*, B., in *Wait* v. *Baker*, 2 Exch. 8, 9.

(*c*) Per *Parke*, J., *Dixon* v. *Yates*, 5 B. & Ad. 340.

Where goods are sold and *nothing is said as to the time of delivery or the time of payment,* and everything the seller has to do with them is complete, it is true, as a general proposition, that the property vests in the buyer; the seller being bound to deliver them whenever they are demanded *upon payment of the price,* the buyer having no right to the possession of the goods *till he pays the price:* payment or a tender of the price being a condition precedent on the buyer's part, so that, until he makes such payment or tender, he has no right to the possession (*d*).

When goods are sold *upon credit,* and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him (*e*). "If," says *Wilde,* C. J., "a vendor agrees to sell for a deferred payment, the property passes and the vendee is entitled to call for a present delivery, without payment" (*f*).

"The sale of a specific chattel on credit," says Lord *Denman,* C. J. (*g*), "though that credit may be limited to a definite period, transfers the property in the goods to the vendee, giving the vendor a right of action for the price and a lien upon the goods, if they remain in his possession, till that price be paid." But default of payment does not rescind the contract: the reason of this being, that, "in a sale of chattels, time is not of the essence of the contract, unless it is made so by express agreement, than which nothing can be more easy, by introducing conditional words into the bargain" (*h*).

(*d*) Judgm. *Bloxam* v. *Sanders,* 4 B. & C. 948; *Tarling* v. *Baxter,* 6 B. & C. 364, 365; Per *Bayley,* J., *Simmons* v. *Swift,* 5 B. & C. 862, and in *Miles* v. *Gorton,* 2 C. & M. 511; *Milgate* v. *Kebble,* 3 M. & Gr. 100.

(*e*) Judgm. *Bloxam* v. *Sanders,* 4 B. & C. 948.

(*f*) *Spartali* v. *Benecke,* 10 C. B. 212, 216.

(*g*) *Martindale* v. *Smith,* 1 Q. B. 395.

(*h*) *Martindale* v. *Smith,* supra.

Where goods are delivered "*on sale or return*," and are not returned within a reasonable time, the sale of the goods becomes absolute (*i*).

Another important proposition relating to the contract of sale is this—that, where under the contract something remains to be done by the vendor of goods, as between himself and the vendee, before they are to be delivered, a complete present right of property in the goods is not in general vested by the contract in the buyer (*j*). "Where there is a sale of goods generally, no property in them passes till delivery, because until then the very goods sold are not ascertained" (*k*). In like manner, where a bargain is made for a certain quantity out of a greater quantity of goods, and there is a power of selection in the vendor to deliver which particular lot or parcel of goods he thinks fit, the right of property in the subject-matter of the contract does not pass to the vendee until the vendor has made his selection. "If I agree to deliver a certain quantity of oil, as ten out of eighteen tons, no one can say which part of the whole quantity I have agreed to deliver until a selection is made" (*l*). There is in this case no individuality until the parcel has been divided from the bulk. As soon, however, as the vendor has appropriated a specific part of the bulk for the benefit of the vendee, and the latter has assented to such appropriation, the property in that specific part passes to the vendee (*m*).

As well in the class of cases just adverted to as in those

(*i*) *Moss* v. *Sweet*, 16 Q. B. 493.

(*j*) *Hanson* v. *Meyer*, 6 East, 614; *Wallace* v. *Breeds*, 13 East, 522; *Rugg* v. *Minett*, 11 East, 210, and cases cited post, p. 413, n. (*q*).

(*k*) Per *Parke*, J., *Dixon* v. *Yates*, 5 B. & Ad. 340.

(*l*) Per *Bayley*, B., *Gillett* v. *Hill*, 2 C. & M. 535; *White* v. *Wilks*, 5 Taunt. 176; *Busk* v. *Davis*, 2 M. & Sel. 397. See *Cunliffe* v. *Harrison*, 6 Exch. 903.

(*m*) *Rohde* v. *Thwaites*, 6 B. & C. 388; *Alexander* v. *Gardner*, 1 Bing. N. C. 671. See *Tripp* v. *Armitage*, 4 M. & W. 687, and cases there cited.

which raise the question whether or not there has been a delivery of goods actual or constructive, very nice distinctions, which can only be appreciated by a careful comparison of decided cases, have been taken. As illustrating the nature of a 'constructive' delivery, the cases below cited may be consulted (*n*).

Delivery to the agent of the vendee will in ordinary cases be equivalent to a delivery to the vendee himself. It is, indeed, generally true, as remarked in *Bryans* v. *Nix* (*o*), that, if the intention of the parties to pass the property, whether absolute or special, in ascertained chattels is established, and they are placed in the hands of a depositary on account of the person who is to have that property, and the depositary assents, it is enough, and it matters not by what documents this may be effected. With reference to the legal consequences which may result from a delivery of goods to a common carrier, Lord *Cottenham*, C., in *Dunlop* v. *Lambert* (*p*), thus observes: "It is no doubt true, as a general rule, that the delivery by the consignor to the carrier is a delivery to the consignee, and that the risk is after such delivery the risk of the consignee. This is so, if without designating the particular carrier the consignee directs that the goods shall be sent by the ordinary conveyance: the delivery to the ordinary carrier is then a delivery to the consignee, and the consignee incurs all the risk of the carriage. And it is still more strongly so if the goods are sent by a carrier specially pointed out by the consignee himself, for such carrier then becomes his spe-

(*n*) *Boulter* v. *Arnott*, 1 C. & M. 333; *Simmons* v. *Swift*, 5 B. & C. 857; *Smith* v. *Chance*, 2 B. &. Ald. 753, 755; *Wilmshurst* v. *Bowker*, 7 M. & Gr. 882; *Key* v. *Cotesworth*, 7 Exch. 595.

(*o*) 4 M. & W. 791. Per *Parke*, B., *Wait* v. *Baker*, 2 Exch. 7.

(*p*) 6 C. & F. 620; *Dawes* v. *Peck*, 8 T. R. 330; *Fragano* v. *Long*, 4 B. & C. 219; *Swain* v. *Shepherd*, 1 M. & Rob. 223; *Brandt* v. *Bowlby*, 2 B. & Ad. 932; *Freeman* v. *Birch*, 1 N. & M. 420.

cial agent." But this rule may, as the Lord Chancellor proceeds to remark in the case just cited, be varied by arrangement between the parties or by their mode of dealing.

Let us now advert to another case, somewhat different from those which have been already noticed in connection with the contract of sale, viz. where goods are ordered to be made for and on account of an intended purchaser. In this case, whilst the goods are actually in progress, the materials used in their construction belong to the maker, and, at all events, the property in the goods does not vest in the party who gives the order, until they are completed. For although, whilst the goods are in progress, the maker may intend them for the person ordering, still he may afterwards deliver them to another, and vest the property in them in that other, thereby rendering himself liable, perhaps, to an action for breach of contract, but nevertheless giving a good title to the party to whom the goods are delivered (*q*). In the case here put, no right of action would accrue to the artificer employed during the progress of the work; but when the chattel has assumed the character bargained for, and *the employer has accepted it*, the party employed may maintain an action for goods sold and delivered; or, if the employer refuses to accept, he may be sued specially for such refusal (*r*). Acceptance by the intended purchaser of the chattel, or an appropriation of it to his use assented to by him being, however, under the circumstances supposed, necessary for transferring the property in it from the seller to the purchaser (*s*).

(*q*) Per *Bayley*, J., *Atkinson* v. *Bell*, 8 B. & C. 282, cited per *Tindal*, C. J., *Grafton* v. *Armitage*, 2 C. B. 340; *Mucklow* v. *Mangles*, 1 Taunt. 318. See *Reid* v. *Fairbanks*, 13 C. B. 692.

(*r*) Per *Bayley*, J., 8 B. & C. 283, 284.

(*s*) *Wilkins* v. *Bromhead*, 6 M. & Gr. 963; *Elliott* v. *Pybus*, 10 Bing. 512.

Such is the relative position of the employer and employed, where a simple order for the making of goods or of some specified article has been accepted and is in course of execution; the rights of the parties as well as the ownership of the thing bargained for depending, however, where any special contract has been made, upon its precise terms and wording.

Where a contract of sale has been entered into for an article in an unfinished state, which is to be completed by the vendor, the question, in whom the property is vested at any given moment? will usually depend upon the construction of the contract. Is an immediate sale of the article contemplated thereby (*t*)? Is it a contract for an article to be finished? In this latter case the article must be finished before the property vests. A chattel which is to be delivered *in futuro* does not usually pass *by the contract* (*u*). To the contract of sale, indeed, the maxim *modus et conventio vincunt legem* strikingly applies; for, although it is generally true, that, to constitute a sale, which shall immediately pass the property in a chattel, it is necessary that the thing sold should be ascertained, and further, that its price should be ascertained or ascertainable, yet parties may buy or sell a given thing at a price to be afterwards ascertained, either in a manner indicated by the contract of sale or upon a quantum valeat; they may agree that the sale shall be complete, and that the property in the specific thing shall pass, although the delivery of possession is postponed, and although something may remain to be done by the seller before deli-

(*t*) See *Reid* v. *Fairbanks*, 13 C. B. 692.

(*u*) Per *Parke*, B., *Laidler* v. *Burlinson*, 2 M. & W. 615; *Clarke* v. *Spence*, 4 Ad. & E. 448; *Woods* v. *Russell*, 5 B. & Ald. 942; *Mucklow* v. *Mangles*, 1 Taunt. 318; *Carruthers* v. *Payne*, 5 Bing. 270. See *Goode* v. *Langley*, 7 B. & C. 26.

very; or they may agree that nothing remains to be done for ascertaining the thing sold, yet that the sale shall not be complete and the property shall not pass before something is done to ascertain the amount of the price. The question must, therefore, in any case such as is now alluded to, be, what was the intention of the parties in regard to the passing of the property? And their intention is of course to be collected from the terms of the contract. If those terms do not shew an intention of passing or transferring the property until something is done by the seller, before delivery of possession, then the sale cannot be deemed perfected, and the property does not pass until that thing is done (*x*).

29 Car. 2, c. 3, s. 17.

Let us now turn to the 17th section of the Statute of Frauds, which has a most important bearing upon that particular branch of the Law Merchant which relates to the sale of goods. It enacts, that "*no contract* for the sale of any *goods, wares, or merchandises,* for the price of 10*l.* sterling or upwards, *shall be allowed to be good,* except

—the buyer shall—accept part of the goods so sold, and actually receive the same;

—or give something—in earnest to bind the bargain,

—or in part of payment—or

that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorised."

Shares in a joint-stock bank (*y*) or railway company (*z*) are not within the operation of this section, nor is railway scrip (*a*); neither does the section apply to a contract for

(*x*) *Logan* v. *Le Mesurier*, 6 Moo. P. C. Ca. 116, 132; *Simmons* v. *Swift*, 5 B. & C. 857; *Swanwick* v. *Sothern*, 9 Ad. & E. 895.

(*y*) *Humble* v. *Mitchell*, 11 Ad. & E. 205.

(*z*) *Duncuft* v. *Albrecht*, 12 Sim. 189; *Bowlby* v. *Bell*, 3 C. B. 284 *Tempest* v. *Kilner*, 3 C. B. 249.

(*a*) *Knight* v. *Barber*, 16 M. & W. 66. See *Tempest* v. *Kilner*, supra.

the sale of foreign stock (*b*); or of shares in a mining company conducted on the cost-book principle (*c*).

At one time, moreover, it was thought doubtful (*d*), whether the above section was applicable to any executory contract, the subject-matter of which did not exist at the time of contracting or was to be delivered afterwards; and, accordingly, by the 7th section of Lord Tenterden's Act (9 Geo. 4, c. 14), the enactment in question is expressly extended "to all contracts for the sale of goods of the *value* (*e*) of 10*l.* sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery." In *Scott* v. *The Eastern Counties R. C.* (*f*), Lord *Abinger*, C. B., remarks, that the above clause and the 17th section of the Statute of Frauds are to be construed as incorporated together; so that if an order be given for goods made, and for others to be made, this will form one entire contract, and acceptance of the former goods will take the case out of the statutes as regards the latter also.

Passing on to inquire respecting the operation of the 17th section of the Statute of Frauds, and its effect in regard to a contract for the sale of "goods, wares, or merchandises," we shall at once remark that the words affecting the efficacy of the contract there used, assuming it to fall within but

(*b*) *Heseltine* v. *Siggers*, 1 Exch. 856. As to the scope of the above section see also *Duncan* v. *Tindall*, 13 C. B. 258, 267; *Chatfield* v. *Cox*, 21 L. J., Q. B., 279.

(*c*) See *Watson* v. *Spratley*, Exch., July 7, 1854.

(*d*) See the remarks of *Littledale*, J., in *Smith* v. *Surman*, 9 B. & C. 574; *Groves* v. *Buck*, 3 M. & Sel. 178.

(*e*) See per *Tindal*, C. J., *Hoadly*, v. *M'Laine*, 10 Bing. 487.

(*f*) 12 M. & W. 33

not to fulfil the requirements of that section, differ essentially from the corresponding words in the 4th section of the Act; for, whereas the last-mentioned section merely provides that "no action shall be brought" in any one of the cases therein specified, unless the agreement sued upon be in writing, the 17th section says, that "no contract" therein referred to "shall be allowed to be good" if it be neither part performed in the manner there specified, nor evidenced by writing.

The 4th section of the Act then does not avoid contracts not signed in the manner thereby prescribed, it only precludes any right of action upon them. The 17th section is stronger and avoids contracts not made as it directs(*e*).

Keeping the above remark in mind, the 17th section will be found to render void every contract for the sale of goods of the value of 10*l.* or upwards, unless there be on the part of the buyer an acceptance and receipt of part of the goods, or something given by way of earnest or in part payment, or unless there be a note or memorandum in writing of the bargain signed by the parties to be charged thereby, or their agents.

What then is an 'acceptance and actual receipt' of goods sufficient to satisfy the section of the Act above set out? It is obvious that in very many cases the answer to this question will depend purely and strictly upon the *facts* adduced in evidence, and will not consequently involve any legal difficulty whatsoever. A few recent cases of this kind shall be first mentioned:—

In *Saunders* v. *Topp*(*f*) the facts were these:—The de-

(*e*) Per *Bosanquet*, J., *Laythoarp* v. *Bryant*, 2 Bing. N. C. 747; *Leroux* v. *Brown*, 12 C. B. 801 (where *Reade* v. *Lamb*, 6 Exch. 130, and *Carrington* v. *Roots*, 2 M. & W. 248, are commented upon). See *Waters* v. *Towers*, 8 Exch. 401, 403.

(*f*) 4 Exch. 390.

fendant verbally agreed to buy some sheep, which he selected from the plaintiff's flock and directed to be sent to his own field. The sheep were driven to the defendant's farm accordingly, and after an interval of two days were counted by him, and found in number to be correct. Shortly afterwards, however, the defendant repudiated the purchase of the sheep, and when sued for their price set up as a defence the Statute of Frauds, on the ground that there had been no part payment (which was true), nor any *acceptance* of the sheep. The Court, however, held that there was evidence for the jury of an acceptance and receipt within the meaning of the statute.

In *Beaumont* v. *Brengeri* (*g*), a receipt and an acceptance were held to have been properly inferred from the following facts:—A. (the defendant) agreed to purchase of B. (the plaintiff) a carriage then standing in B.'s shop; and, after some alterations had been made in the carriage by the defendant's order, he requested that it might remain (as in fact it did) on the plaintiff's premises, but the defendant himself made use of it on one occasion. It was argued, in this case, that there had been no delivery (*h*) to the defendant, nor any acceptance and actual receipt by him of the carriage; and many authorities were cited in support of that view: but the Court nevertheless held, that there had been both a sufficient delivery and acceptance of the carriage; that the defendant had dealt with it as his own; and that the plaintiff, in retaining the actual ostensible possession of the carriage, was, under the circumstances, to be regarded as filling the character of a mere agent or warehouseman for the defendant.

(*g*) 5 C. B. 301.

(*h*) If there were no 'delivery' there could be no 'receipt' of the carriage, post, p. 420.

With the cases above cited may usefully be compared *Holmes* v. *Hoskins*(*i*), and *Curtis* v. *Pugh*(*k*). In the former of these cases the facts in evidence were as follow:—The defendant, who was a butcher, verbally agreed with the plaintiff to purchase of him some cattle then being in his (the plaintiff's) field. After the bargain was concluded, the defendant, finding that he had not got his cheque-book with him, told the plaintiff to call at his house in the evening and he should be paid. It was then arranged that the cattle should remain in the plaintiff's field for a few days, and should be fed with the plaintiff's hay by the defendant. This was accordingly done, and the defendant having afterwards repudiated the bargain, the question arose whether there was evidence of an acceptance and a receipt of the cattle within the statute. The Court of Exchequer held that no reasonable evidence to this effect appeared; there had been no actual receipt of the cattle by the defendant; and the act of feeding the cattle with the plaintiff's assent could not be deemed an exercise of such an act of ownership as to amount to an acceptance by, and constructive delivery to, the defendant.

In *Curtis* v. *Pugh*(*k*) the evidence was, that a quantity of glue had been sent to the defendant as purchaser, and unpacked by him with a view to an examination of its quality; and, although the condition of the glue was thereby materially altered, so that it could not be repacked as it had originally been, the Court of Queen's Bench thought, that, from that fact alone, an acceptance of the goods within the statute was not necessarily to be inferred.

It will be remembered, that, to satisfy the Statute of

(*i*) 9 Exch. 753, *Tempest* v *Fitzgerald*, 3 B & Ald 680. (*k*) 10 Q B 111.

Frauds, there must be both an acceptance and a receipt of the goods (*m*). Now, a receipt implies delivery (*n*) which may be actual or constructive; the statutory words 'actual receipt' signifying "delivery of the possession of the goods on behalf of the vendor to the vendee, and the receipt of the possession by the vendee" (*o*). A 'constructive receipt' may of course be evidenced in very many different ways. "Where goods are ponderous and incapable of being handed over from one to another, there need not" says Lord *Kenyon*, C. J., "be an actual delivery; but it may be done by that which is tantamount, such as the delivery of the key of a warehouse in which the goods are lodged, or by delivery of other indicia of property" (*p*). The larger the bulk of the goods, indeed, the more impracticable does a manual receipt become; something there must consequently be in the nature of constructive receipt, as there is constructive delivery (*q*). It will therefore usually be a question for the jury, whether any particular instance of acting or forbearing to act amounts to an acceptance and receipt (*r*).

It is obvious that there may be an acceptance and receipt of goods, although they remain in the possession of the vendor. For instance, if the vendee takes the goods and gives them to a porter, and as he is about to carry them away the vendee says to the vendor 'I would rather leave them here until to-morrow;' under such circumstances a jury might fairly conclude that there had been an accept-

(*m*) See per *Parke*, B., *Holmes* v. *Hoskins*, 9 Exch. 755.

(*n*) Per *Parke*, B., *Saunders* v. *Topp*, 4 Exch. 394.

(*o*) *Farina* v. *Home*, 16 M. & W. 119, 123.

(*p*) *Chaplin* v. *Rogers*, 1 East, 191, 194. See *Bentall* v. *Burn*, 3 B. & Cr. 423; *Farina* v. *Home*, supra.

(*q*) Per *Williams*, J., *Bushel* v. *Wheeler*, 15 Q. B. 445.

(*r*) Per *Coleridge*, J., *Bushel* v. *Wheeler*, supra. See *Bill* v. *Bament*, 9 M. & W. 36.

ance and actual receipt of the goods in question so as to satisfy the statute(*s*).

If, however, there be no delivery, either actual or constructive, there can be no receipt. Suppose, for instance, that, after negotiations have taken place for the sale of goods, some act remains to be done by the purchaser, which must necessarily precede delivery, as the selection and marking of growing timber; whilst such act remains to be done, there can be no delivery to, and consequently no receipt by, the purchaser(*t*).

What in the next place is an acceptance of goods within the meaning of the statute? This question cannot, regard being had to recent decisions, be quite satisfactorily answered. It strikes us at once, however, that acceptance implies something more than a mere receipt. Thus, if goods be sent on approval, or with a right expressly reserved to the buyer to elect to return them by a time specified if found in quality unsatisfactory, the mere fact of the goods having been received by him subject to such condition, and having been kept for a time in his possession, but returned whilst the right of election still remained to him, would not per se constitute an acceptance of the goods within the statute(*u*).

If, however, acts of ownership be exercised by the purchaser over goods which have been ordered by him or on his account, from such acts may often be inferred an acceptance of the goods by him so as to satisfy the statute.

In *Morton* v. *Tibbett* (*x*) the facts were these:—The de-

(*s*) Per *Pollock*, C. B., 9 Exch. 755.

(*t*) *Acraman* v. *Morrice*, 8 C. B. 449, and cases there cited.

(*u*) *Cunliffe* v. *Harrison*, 6 Exch. 903; *Hart* v. *Mills*, 15 M. & W. 85; *Lillywhite* v. *Devereux*, Id. 285.

(*x*) 15 Q. B. 428.

fendant purchased wheat of plaintiff by sample, and directed that the bulk should be delivered on the next morning to a carrier named by himself, who was to convey it to the market town of W., and the defendant himself took the sample away with him. On the following morning the bulk was delivered to the carrier, and the defendant resold it at W., on that day, by the same sample. The carrier conveyed the wheat by order of defendant, who had never seen it, to the subvendee, who rejected it as not corresponding with the sample; and the defendant, on notice thereof, repudiated his contract with the plaintiff on the same ground. Upon this state of facts, the Court of Queen's Bench held, that the jury were warranted in finding an acceptance and actual receipt of the wheat by the defendant, so as to satisfy the requirements of the 17th section of the Statute of Frauds; a decision which seems quite sustainable on this short ground, that the vendee, having resold the goods and altered their destination in the carrier's hands, had exercised acts of ownership over the goods.

Under circumstances at all similar to those above detailed, the question, whether or not there has been an acceptance and receipt, seems to be one of fact rather than of law, and hence has arisen a discrepancy amongst the cases (*y*). Where, however, goods are ordered to be sent by sea, but no ship is named by the vendee, it seems clear that the mere delivery on board a ship unnamed by him, and the signing by the master of that ship of a bill of lading to carry the goods for the vendee, would not constitute a sufficient acceptance and receipt within the statute (*z*). Though,

(*y*) These cases will be found collected in the judgm. *Morton* v. *Tibbett*, supra; and in Chitt. Cont. 3rd ed. pp. 341-8.

(*z*) *Meredith* v. *Meigh*, 2 E. & B. 364; *Hanson* v. *Armitage*, 5 B. &

if goods, or the indicia of the property in goods, remain long under the control of the vendee, especially where he has in any respect acted as owner of the goods, there may be sufficient evidence of an acceptance and receipt by him, although the goods themselves are not received (*a*). And it may be well to add, that, if there be a joint and entire contract for two different classes of goods, or for several different articles, acceptance of one class of goods or of one such article will be a sufficient acceptance of part within the 17th section of the Statute of Frauds, or within the 7th section of Lord Tenterden's Act (*b*).

Thus far, then, no special difficulty, save in regard to estimating the weight of proof adduced, might, in connection with the subject before us, be thought likely to present itself. In *Morton* v. *Tibbett* (*c*), (the facts in which case have been above stated), the Court of Queen's Bench took occasion, however, to examine minutely the precise meaning of the statutory phrase, 'acceptance and actual receipt' as applied to goods sold; and Lord *Campbell* there, in an elaborate judgment, reviews the prior cases decided with reference to the phrase in question, and arrives at these conclusions:—that the acceptance contemplated by the Act is to precede, or at any rate to be contemporaneous with, the actual receipt of the goods, and is not to be a subsequent act after the goods have been actually received, weighed, measured, or examined; that there may be an acceptance and

Ald. 557; *Hart* v. *Sattley*, 3 Camp. 528, must be considered as overruled.

(*a*) Per *Crompton*, J., *Meredith* v. *Meigh*, 2 E. & B. 374; *Bushel* v. *Wheeler*, 15 Q. B. 442; with which case, however, compare *Norman* v. *Phillips*, 14 M. & W. 277.

(*b*) *Elliott* v. *Thomas*, 3 M. & W. 170, followed in *Bigg* v. *Whisking*, 14 C. B. 195; *Baldey* v. *Parker*, 2 B. & Cr. 37. See *Williams* v. *Burgess*, 10 Ad. & E. 499.

(*c*) 15 Q. B. 428: ante, p. 421.

receipt of goods by a purchaser within the Statute of Frauds, although he has had no opportunity of examining them, and although he has done nothing to preclude himself from objecting that they do not correspond with the contract; that the acceptance which will suffice to let in parol evidence of the contract is a different kind of acceptance from that which would afford conclusive evidence of the contract having been fulfilled.

But, although the decision in the above case of *Morton* v. *Tibbett*, upon the facts there appearing, seems unimpeachable, it must not be regarded as settled, that there can be an 'acceptance and actual receipt' of goods within the statute, where the vendee has had no opportunity of judging whether the goods sent correspond with the order; and the case of *Hunt* v. *Hecht* (*d*) shews, at all events, that, in the opinion of the Court of Exchequer, an acceptance to satisfy the statute must be something more than a mere receipt, that it means "some act done *after* the vendee has exercised or had the means of exercising his right of rejection."

With respect to that part of the 17th section which has reference to part payment, and upon which no particular difficulty presents itself, it will be sufficient to say, that, in order to satisfy the words of the Act here alluded to, there must be an actual payment of money by the purchaser to the vendor, or, if no money passes, there must be an actual discharge or extinguishment of some debt due from the latter to the former (*e*).

Pausing for a moment at this point of our inquiry as to

(*d*) 8 Exch. 814. The judgment in *Morton* v. *Tibbett* seems to have been brought under the notice of the Court of Common Pleas in *Duncan* v. *Tindall*, 13 C. B. 258, 268; but no intimation of opinion with reference to it was there requisite.

(*e*) *Blenkinsop* v. *Clayton*, 7 Taunt. 597; *Walker* v. *Nussey*, 16 M. & W. 302.

the effect of the 17th section of the Statute of Frauds, we may conclude as follows—that, although where the price of goods amounts to 10*l.* or upwards the law regards a written memorandum of the bargain as of primary importance, it nevertheless dispenses with such evidence where by mutual consent there has been part performance of the contract. Where, therefore, there has been payment of any sum in earnest to bind the bargain or by way of part payment,—this act, on the part of the buyer, if acceded to on the part of the vendor, is sufficient, and the same effect is given to the corresponding act by the vendor of delivering part of the goods sold to the buyer, *if* the buyer shall accept such part and actually receive the same. As, on the one hand, part payment, however minute the sum paid may be, is sufficient to satisfy the statute; so, on the other, part delivery and acceptance, however minute the portion delivered and accepted may be, will suffice: and if either of these conditions be fulfilled, then the necessity of giving written evidence of the contract is waived, and it may be established by oral evidence, just as it might have been before the Statute of Frauds passed (*f*). Where, however, a party sues upon a contract falling within the 17th section of the Act, he must be prepared to shew a *good contract* actually in existence at the time of action brought; and, to make it a good contract under the statute, there must be one of the requisites therein mentioned; so that a written memorandum or part payment after action brought will not be sufficient to satisfy the statute (*g*).

To pursue our inquiry as to the operation of the 17th section:—In the absence of 'acceptance and actual receipt' of part of the goods sold, of anything given in earnest or in part

(*f*) See the judgm. *Morton* v. *Tibbett*, 15 Q. B. 433-4.

(*g*) *Bill* v. *Bament*, 9 M. & W. 40-1; per *Erle*, J., 17 Q. B. 107.

of payment, the concluding words of the section before us render necessary some note or memorandum in writing of the bargain, signed by the parties to be charged by the contract, or their agents thereunto lawfully authorised. Now, with regard to these concluding words, it is worthy of remark, that the note or memorandum in writing relied upon as satisfying the statute should so far set forth the terms of the contract actually made, that they may not be left in dubio, and that fraud and mistake respecting them may be excluded (*h*); for instance, although a letter from the plaintiff to the defendant, together with the answer to it, would, if sufficiently explicit in regard to the particular agreement concluded between them, constitute a sufficient memorandum in writing within the 17th section, yet it would be otherwise if all the terms of the contract specifically agreed to were not thus expressed; for, in such case, there would be no written evidence by an appeal to which any question in dispute between the parties might be decided (*i*). If, therefore, the price of the goods sold or contracted for has been arranged between the parties, it must appear in the memorandum of their bargain (*k*); whereas, if no particular price has been stipulated for, it will suffice to put down in writing the terms of the contract really concluded (*l*).

The names of both parties to the contract must appear in the note or memorandum required by the 17th section, or in some writing sufficiently connected with it; but the signature of the party "to be charged" by the contract, is suf-

(*h*) Per Lord *Abinger*, C. B., 2 M. & W. 658.

(*i*) *Archer* v. *Baynes*, 5 Exch. 625, and cases there cited; *Johnson* v. *Dodgson*, 2 M. & W. 653. See *Cunliffe* v. *Harrison*, 6 Exch. 903.

(*k*) *Elmore* v. *Kingscote*, 5 B. & C. 583.

(*l*) *Hoadly* v. *M'Claine*, 10 Bing. 482.

As to the question, when may a contract of sale be said to be definitively concluded? see *Hutchison* v. *Bowker*, 5 M. & W. 535; *Jordan* v. *Norton*, 4 M. & W. 155.

ficient (*m*). And, although, if the original contract were itself in writing, signed by both parties, *that* whilst unrescinded would be the binding instrument, so that no subsequent memorandum signed by one party only could have any effect; yet, it seems clear, that, if a contract perfect and definite in its terms be made without writing, and if a note or memorandum merely in writing be at some future period made, embodying that contract, and be signed by the party to be charged or his agent, the statute will be satisfied (*n*).

Signature by agent;

The signature to the "note or memorandum in writing," under the 17th section of the Act, may be that of the "agent" of the party to be charged "thereunto lawfully authorised." It may, for instance, be that of a traveller employed by a mercantile firm, acting within the scope of his regular duties and of the powers conferred upon him—it may be that of an auctioneer, or of a broker.

—by auctioneer;

On the sale of goods by auction, the auctioneer usually acts as agent as well for the buyer as the seller (*o*). He is not, however, ex vi termini, agent for both parties: whether he is so or not will depend upon the facts of the particular case (*p*). Assuming that he is duly authorised by the vendor, and that

(*m*) *Laythoarp* v. *Bryant*, 2 Bing. N. C. 735; *Allen* v. *Bennet*, 3 Taunt. 169; *Johnson* v. *Dodgson*, 2 M. & W. 653; *Saunderson* v. *Jackson*, 2 B. & P. 238; *Egerton* v. *Mathews*, 6 East, 307; Per *Patteson*, J., *Sievewright* v. *Archibald*, 17 Q. B. 114.

(*n*) Per *Patteson*, J., 17 Q. B. 114.

(*o*) *Simon* v. *Motivos*, 3 Burr. 1921. The auctioneer is clearly agent for the vendor. The assent of both parties is, however, necessary to make the contract binding; assent is signified on the part of the seller by knocking down the hammer; on the part of the purchaser by bidding. But it seems that a bidder has a locus pœnitentiæ, and may retract his bidding before the hammer falls: *Payne* v. *Cave*, 3 T. R. 148, 149.

(*p*) *Bartlett* v. *Purnell*, 4 Ad. & E. 792.

the biddings proceed with regularity, the proper mode of complying with the requirements of the statute on a public sale of goods to the amount of 10*l.* or upwards, is for the auctioneer to write down in his sale book (which should always contain a copy of the conditions of sale) the Christian and surname of the highest bidder as purchaser, and also the amount of the purchase-money opposite to the lot purchased (*q*). When the auctioneer, or his clerk (*r*) acting under his direction, thus signs for the purchaser, the Statute of Frauds will be satisfied, because there will thus have been made "a note or memorandum in writing" of the "bargain," signed by the lawfully authorised agent of the vendee. The authority to sign being indeed expressly given or signified on behalf of the purchaser by bidding (*s*).

It is clear that, in the case just put, the contract between the vendor and vendee of the goods, constituted by the conditions of sale and description of the lot, cannot at the time of sale be varied by any oral statement of the auctioneer (*t*). If any alteration be required in the conditions or particulars, such alteration should be made in writing before the sale of the lot in question has commenced. In general, moreover, as soon as the sale by auction has taken place, and the deposit-money has been paid, the authority of the auctioneer is at an end; and therefore, if goods sent for public sale are not sold, or if there be any alteration in the conditions after the property is knocked down, the sale ought to be treated

(*q*) Bateman on Auctions, 3rd ed. p. 167; *Kenworthy* v. *Schofield*, 2 B. & C. 945; *Hinde* v. *Whitehouse*, 7 East, 558, 568. See *Roots* v. Lord *Dormer*, 4 B. & Ad. 77.

(*r*) *Bird* v. *Boulter*, 4 B. & Ad. 443. See *Gosbell* v. *Archer*, 2 Ad. & E. 500.

(*s*) *Emmerson* v. *Heelis*, 2 Taunt. 38, 48; *White* v. *Proctor*, 4 Taunt. 209; supra, n. (*o*).

(*t*) *Shelton* v. *Livius*, 2 Cr. & J. 411; explained and distinguished in *Eden* v. *Blake*, 13 M. & W. 614, 617.

as one by private contract, and a written agreement should be prepared accordingly, and signed by the principals themselves; for otherwise doubts may well arise as to the power of the auctioneer to make or sign on behalf of the vendor any contract but that founded on the conditions of sale (*u*). The remark just made may probably in practice oftener be material in connection with a sale of land or an interest therein under sect 4 of the Statute of Frauds, than with reference to a sale of "goods, wares, or merchandises" under the 17th section.

An auctioneer, it should be observed, is entitled to sue for the price of goods sold by him in the course of his business, because, not only is he privy to the contract of sale, but he has a special property in the subject matter of it (*v*). Now, it has been held, that one of the parties to a sale of goods of the price of 10*l.* or upwards cannot act as agent for the other party, so as to bind him under the statute by signing for him a memorandum of the sale (*w*): the auctioneer, therefore, when plaintiff in an action for the price of goods sold by him at auction, will be precluded from availing himself of his signature in his sale book of the defendant's name as a compliance with the Statute of Frauds (*x*); though, if the signature in question were entered in the sale book by the auctioneer's clerk, that would be sufficient (*y*).

Another agent commonly concerned in the sale of goods, Signature by broker.

(*u*) Bateman on Auctions, 3rd ed. p. 173; *Sykes* v. *Giles*, 5 M. & W. 645, 651; Story on Agency, 4th ed. pp. 128-9.

(*v*) *Williams* v. *Millington*, 1 H. Bla. 81; per *Park*, J., *Coppin* v. *Walker*, 7 Taunt. 241; per Lord *Abinger*, C B, 5 M. & W. 650; *Davis* v. *Danks*, 3 Exch. 435, 437; *Taplin* v. *Florence*, 10 C. B. 744, 764.

(*w*) *Graham* v. *Musson*, 5 Bing. N. C. 603; *Graham* v. *Fretwell*, 3 M. & Gr. 368; *Wright* v. *Dannah*, 2 Camp. 203.

(*x*) *Farebrother* v. *Simmons*, 5 B. & Ald. 333.

(*y*) *Bird* v. *Boulter*, 4 B. & Ad. 443.

and "lawfully authorised" to bind his principal under the 17th section of the Statute of Frauds, is a broker(*z*), who may be defined to be an agent employed to make bargains and contracts between third persons in matters of trade, commerce, or navigation, for a pecuniary compensation, called 'brokerage'(*a*) or 'commission.'

A broker, who acts as well for the vendor as for the purchaser of "goods, wares, or merchandises," may undoubtedly bind either of his principals by signing a "note or memorandum in writing" of the bargain concluded between them, as required by the statute(*b*). Difficulty may, however, be felt in determining what constitutes the contract between the parties(*c*), and what is a note or memorandum of it sufficient within the statute.

To explain this matter satisfactorily, let us refer to the practice of sharebrokers and stockbrokers in the city of London. When a contract of sale is there made through the medium of a broker, the broker is bound to enter in his book (*d*), and sign the contract; and if he does so, the entry thus made by him will constitute the contract binding on the parties, for, being authorised by the one party to sell, and by the other to buy, in the terms of the contract—when the broker has reduced it into writing and signed it as their common agent, it binds them both according to the Statute of Frauds, as if both had signed it with their own hands.

(*z*) *Rucker* v. *Cammeyer*, 1 Esp. 105; *Hinde* v. *Whitehouse*, 7 East, 569.

A broker cannot, however, without the consent of his principal, delegate his authority; for, *delegata potestas non potest delegari: Henderson* v. *Barnewall*, 1 Y. & J. 387.

(*a*) Story on Agency, 4th ed p. 30.

(*b*) *Rucker* v. *Cammeyer*, 1 Esp. 105; *Chapman* v. *Partridge*, 5 Id. 256. See *Pitts* v. *Beckett*, 13 M. & W. 743.

(*c*) See *Moore* v. *Campbell*, 23 L. J. Exch. 310.

(*d*) As to this book, which the broker is required to keep, see Russell on Factors, pp. 46, 345.

Such is the duty of the broker, and it is further the practice for him to send what are called the bought and sold notes to his principals—the bought note to the buyer, and the sold note to the seller—by way of intimating that he has acted upon their instructions. Sometimes, however, or rather as it would seem very frequently, the broker omits to enter or sign any contract in his book, but contents himself with sending to his clients the bought and sold notes in the manner just mentioned. If these notes agree, they are held, and justly, to constitute a binding contract, sufficient within the Statute of Frauds; but if there be any material variance between them, the case of *Sievewright* v. *Archibald* (*e*), shews us that they are both nullities, and that, in this case consequently, there is, in the absence of part payment and part acceptance, no binding contract at all between the parties upon which an action could be brought. For contracting parties must consent *ad idem;* and where the terms of the two notes differ, there can be no reason why faith should be given to the one rather than to the other (*f*).

It may seem almost superfluous to cite authorities in addition to those specified in the preceding pages (*g*), with a view to shewing that a written contract, falling within the operation of the 4th or of the 17th section of the Statute of Frauds, cannot be *varied* by a subsequent oral agreement between the contracting parties. Two well-considered cases, further illustrating the rule of evidence in question, may however here conveniently be mentioned, as being in

(*e*) 17 Q. B. 103, where the cases are reviewed. See *Trueman* v. *Loder*, 11 Ad. & E. 589.

(*f*) A material alteration in the sold note made by the buyer without the knowledge or consent of the seller will prevent the former from suing on the contract: *Mollett* v. *Wackerbarth*, 5 C. B. 181.

(*g*) Ante, pp. 399, 406, 428.

principle generally applicable where the statute law requires that a contract shall be in writing. The cases alluded to are *Goss* v. *Lord Nugent*(*h*), decided under sect. 4, and *Marshall* v. *Lynn*(*i*), decided under sect. 17 of the Act above mentioned.

In *Goss* v. *Lord Nugent* the facts were these:—By an agreement in writing the plaintiff contracted to sell to the defendant several lots of land, and to make a good title thereto; and the deposit-money was paid in pursuance of this agreement by the defendant; it was however afterwards discovered that a good title could not be made to one small lot included in the sale; but the defendant said he would accept the title notwithstanding this defect; and possession of the whole was given up to him. On delivery of the abstract of title by the vendor, the defendant's solicitor nevertheless objected to the title so far as regarded the small lot above mentioned, and the defendant refused to complete the purchase. An action having been brought by the vendor to recover the unpaid residue of the purchase-money, it was objected that oral evidence of a waiver by the defendant of his right to have a good title as to the small lot was not admissible, inasmuch as the Statute of Frauds required the whole agreement between the contracting parties to be in writing. And of this opinion was the Court in banc, Lord *Denman* remarking that the object of the statute was to exclude *all* oral evidence as to contracts for the sale of land, and to require that any such contract when sought to be enforced should be proved by writing only. His Lordship further observed, that in the case before the Court the contract sought to be enforced was not in truth the written agreement, but a new contract entered into by the parties,

(*h*) 5 B. & Ad. 58. (*i*) 6 M. & W. 109.

which it was proposed to prove partly by the original written agreement, and partly by the subsequent verbal agreement; so that the contract put in evidence to support the action was not entirely in writing (*k*). In this case an opinion was however intimated by the Court, that a written contract concerning the sale of land may be *wholly waived and abandoned* by a subsequent oral agreement, so as to prevent either party from recovering upon the contract which was in writing (*l*).

In *Marshall* v. *Lynn* (*m*), it appeared that the defendant had entered into a written contract for the purchase of potatoes, the price whereof exceeded 10*l.*, from the plaintiff, to be shipped on board a vessel named in the contract, when she should next arrive at the port of W. An alteration in regard to the time of shipping the potatoes was afterwards agreed to verbally by the parties; and, in an action against the purchaser for not accepting them according to his contract, the point to be decided was, whether such alteration by parol of the written contract was binding. The Court of Exchequer held, that it was not so,—that the same rule must prevail as to the construction of the 17th section as had, in *Goss* v. *Lord Nugent* (*n*), prevailed in regard to the construction of the 4th section of the Statute of Frauds; that, if the original written contract required by either of those sections be varied, and a new contract as to any of its terms be substituted in the place of it, that new contract cannot be enforced in law unless it also be in writing (*o*). It seems, however, that the rule in question, whereby con-

(*k*) Acc. *Stowell* v. *Robinson*, 3 Bing. N. C. 928; *Harvey* v. *Grabham*, 5 Ad. & E. 61, 74.

(*l*) Judgm. 5 B. & Ad. 66. See *Harvey* v. *Grabham*, 5 Ad. & E. 74.

(*m*) 6 M. & W. 109.

(*n*) See also *Hargreaves* v. *Parsons*, 13 M. & W. 561, 568; *Horne* v. *Wingfield*, 3 Sc. N. R. 340.

(*o*) Judgm. 6 M. & W. 117; *Stead* v. *Dawber*, 10 Ad. & E. 57; *Moore* v. *Campbell*, 23 L. J., Exch., 310.

tracts in writing are not allowed to be subsequently varied by parol, applies only where the particular contract is *required by law* to be in writing (*p*).

Besides the Statute of Frauds, there are various enactments, which, to authenticate transactions specified therein, require that writing shall be used; of these, Lord *Tenterden's* Act (9 Geo. 4, c. 14) has for the common law practitioner peculiar and obvious importance, relating, as it does, to matters which are constantly falling under his notice. Of this Act, two sections (ss. 6 (*q*) and 7 (*r*)) have been already sufficiently considered; and other clauses of the Act in question, particularly sects. 1 and 5, which concern respectively promises to bar the Statute of Limitations (21 Jac. 1, c. 16), and promises by adults to pay debts contracted during infancy, will hereafter be specially adverted to. I shall now, accordingly, without further inquiry as to written contracts in particular (*s*), conclude this Chapter with some remarks respecting simple contracts generally—oral or written—the object immediately in view being to contrast a simple with a special contract, regard being had to the leading characteristics of either. I shall also specify some few cases, in each of which our law requires that the contract entered into between parties shall be under seal.

A specialty contrasted with a simple contract.

Now, on reference to p. 276, it will be seen that a specialty works a merger; operates by way of estoppel; requires no consideration to support it; will in some cases bind the heir of the covenantor or obligor; and can only be discharged by an instrument under seal or by the judgment of a Court of competent authority. A simple contract on the other hand,

(*p*) Per *Maule*, J., *Pontifex* v. *Wilkinson*, 2 C. B. 361; Sugd. Conc. V. p. 105, (*d*); ante, p. 379.

(*q*) Ante, p. 398.

(*r*) Ante, p. 415.

(*s*) The subject in question is discussed in Tayl. Evid. vol 2, pp. 660 et seq

which fills the lowest rank amongst obligations recognised in law, cannot on that account, it is obvious, work a merger; although it may operate as an admission, it does not, except in some peculiar cases(*t*), act by way of estoppel(*u*). A simple contract *does* (usually(*v*)) require a consideration to support it(*x*); it will, as already stated(*y*), and as we shall hereafter see at greater length, bind the *personal*—not the *real*—representative of the contractor. An executory contract not under seal may (even, as it seems, when required to be in writing by statute,) be discharged by parol before breach(*z*).

"It is competent," says *Parke*, B., in a recent case(*a*), "for both parties to an *executory* contract, by mutual agreement, without any satisfaction, to discharge the obligation

(*t*) For instance, a tenant is said to be 'estopped' from denying his landlord's title. An agent is not permitted to dispute the title of his principal in the subject-matter of the agency. (Story on Agency, 4th ed. p. 272). And the doctrine of estoppel has also some application in regard to bills of exchange and promissory notes. (Post, Ch. 3). See *Reg.* v. *Evans*, 3 E. & B. 363.

(*u*) See *Cannam* v. *Farmer*, 3 Exch. 698; *Graves* v. *Key*, 3 B. & Ad. 313, (which shows that a receipt not under seal is an admission only).

"The acts *in pais*, which bind parties *by way of estoppel*, are but few, and are pointed out by Lord Coke, (Co. Litt. 352. a.) They are all acts which anciently really were, and in contemplation of law have always continued to be, acts of notoriety not less formal and solemn than the execution of a deed, such as livery, entry, acceptance of an estate, and the like. Whether a party had or had not concurred in an act of this sort was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed." (Judgm. *Lyon* v. *Reed*, 13 M. & W. 309, cited *Nickells* v. *Atherstone*, 10 Q. B. 949).

Other instances of estoppel in pais will be adverted to in Book III. of this work. See, also, *Waller* v. *Drakeford*, 1 E. & B. 749; *Andrews* v. *Hailes*, 2 E. & B. 349, 353; *Doe* d. *Croft* v. *Tidbury*, 14 C. B. 304, 324.

(*v*) See post, p. 445.

(*x*) Ante, pp. 313, 322.

(*y*) Ante, p. 302.

(*z*) See *Taylor* v. *Hilary*, 1 Cr. M. & R. 741.

(*a*) *Foster* v. *Dawber*, 6 Exch. 851. *King* v. *Gillett*, 7 M. & W. 55, is important with reference to the point here adverted to. See also *Harris* v. *Carter*, 3 E. & B. 559.

of that contract." But the learned Judge proceeds to remark, that "an *executed* contract cannot be *discharged* except by release under seal, or by performance of the obligation, as by payment, where the obligation is to be performed by payment"(*b*).

To an action for unliquidated damages, indeed, "accord and satisfaction," if properly pleaded, will, after breach, afford a good ground of defence. But "it is clear, if the claim be a liquidated and ascertained sum, payment of part cannot be *satisfaction* of the whole, although it may, under certain circumstances, be evidence of a gift of the remainder. But the gift of a thing of uncertain value may be a satisfaction of any sum due on a simple contract. If the contract be by bond or covenant, it can be determined only by something of an equal or higher nature(*c*); but upon a mere simple contract it is clear, that the debtor may give any thing of inferior value in satisfaction of the sum due, provided it be not part of the sum itself;" for, "if the creditor had the money itself, he might buy with it a thing of however inferior value, and that contract would be good; so he may accept the same thing in satisfaction of the whole sum, and that contract is good"(*d*).

The reason why, as just stated, part payment cannot be pleaded in satisfaction of a debt, is thus explained in the case of *Sibree* v. *Tripp* above cited: "It is undoubtedly true,

(*b*) *Foster* v. *Dawber*, ante.

(*c*) Ante, p. 303. *Wilson* v. *Braddyll*, 9 Exch. 718; *Rippinghall* v. *Lloyd*, 5 B. & Ad. 742.

(*d*) Per *Parke*, B., *Sibree* v. *Tripp*, 15 M. & W. 33-4, where *Cumber* v. *Wane*, Stra. 426, is observed upon; *Grimsley* v. *Parker*, 3 Exch. 610, following *Tattersall* v. *Parkinson*, 16 M. & W. 752; *Cooper* v. *Parker*, 14 C. B. 118. See *Gaskill* v. *Skene*, 14 Q. B. 664; *Thame* v. *Boast*, 12 Q. B. 808; *Beaumont* v. *Greathead*, 2 C. B. 494; *Goodwin* v. *Cremer*, 22 L. J., Q. B., 30.

Pinnel's case, 5 Rep. 117, which was an action of debt upon a bond, is a leading authority on the above subject.

that payment of a portion of a liquidated demand, in the same manner as the whole liquidated demand ought to be paid, is *payment* only in part, because it is not one bargain but two, viz., payment of part, and an agreement *without consideration* to give up the residue." "But, if you substitute for a sum of money a piece of paper or a stick of sealing wax it is different, and the bargain may be carried out in its full integrity. A man may give in satisfaction of a debt of 100*l.* a horse of the value of 5*l.*, but not 5*l.*" If, however, the time or place of payment of the money given in satisfaction be different from that of the debt due, the smaller sum may be a satisfaction of the larger, ex. gr. "if, for money, you give a negotiable security, you pay it in a different way; the security may be worth more or less, it is of uncertain value"(*e*), and may therefore, in law, be an equivalent for a larger amount actually due.

Thus much as to the mode of discharging a parol contract; and now, assuming that the characteristics of a contract, special or simple, have been sufficiently exhibited, one question which may reasonably be supposed to have suggested itself yet remains to be answered: is a deed, under any, and if so, under what circumstances, indispensable to the validity of a transaction by our law? Without attempting fully to answer this question, I may observe, that there are certain transactions which at common law, and certain other transactions which by statute, are required to be evidenced by deed. At common law, no incorporeal right or hereditament can be created or transferred otherwise than by deed: such a right is said to lie in *grant* and not in

Deed—when requisite at common law.

(*e*) Per *Alderson*, B., *Sibree* v. *Tripp*, 15 M. & W. 38, where the cases are collected. See also *Lyth* v. *Ault*, cited ante, p. 323; *Jones* v. *Sawkins*, 5 C. B. 142; and cases, supra, n. (*d*).

livery(*f*), and to pass by the mere delivering of the deed of grant or of assignment; a right of common for instance, which is a profit a prendre, or a right of way, which is an easement or right in nature of an easement, cannot be granted or conveyed in fee simple, for life, or for years, without a deed(*g*). An auctioneer, accordingly, who is employed under a parol agreement to sell goods upon the premises of a third party, has no such interest in the goods as will make the license given him to enter upon the premises for the purpose of selling them irrevocable(*h*). Again, at common law, an authority to an agent to execute a deed for his principal must itself be under seal(*i*). A corporation must in general contract by deed(*k*). A gift of a chattel inter vivos, if not perfected by delivery, must be evidenced by deed(*l*). And a mere verbal gift of a chattel to a person in

(*f*) Incorporeal property is so termed because it has no *corpus*, and is not tangible or visible, but exists only in legal contemplation. It may indeed *produce* something substantial and beneficial to the owner, as in the instance of the right to tithes; but, being incapable of actual possession, and passing by the mere deed of grant, it is therefore said to *lie in grant*. The possession of corporeal property on the other hand, ex. gr. houses and land, is capable of actual and visible delivery and transfer, and is therefore said to lie *in livery* (meaning delivery of seisin or possession): Chitt. Gen. Pr. vol. 1, p. 203. Shelf. Real Prop. Stats. 5th ed. p. 49.

By stat. 8 & 9 Vict. c. 106, s. 2, a corporeal hereditament "shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery."

(*g*) *Wood* v. *Leadbitter*, 13 M. & W. 838, which is a leading case upon this subject; *Adams* v. *Andrews*, 15 Q. B. 284, 296; *Bird* v. *Higginson*, 6 Ad. & E. 824; *S. C.*, 2 Ad. & E. 696; *Thomas* v. *Fredricks*, 10 Q. B. 775; *Williams* v. *Morris*, 8 M. & W. 488.

(*h*) *Taplin* v. *Florence*, 10 C. B. 744.

(*i*) *Harrison* v. *Jackson*, 7 T. R. 207, 210; *Wilks* v. *Back*, 2 East, 142; *Berkeley* v. *Hardy*, 5 B. & C. 355; Judg. *Hunter* v. *Parker*, 7 M. & W. 343.

(*k*) Post, Ch. 5.

(*l*) *Irons* v. *Smallpiece*, 2 B. & Ald. 551. A chattel may be mortgaged by parol: *Flory* v. *Denny*, 7 Exch. 581.

whose possession it is does not pass any property in the chattel to the donee(*m*). "By the law of England," says Lord *Tenterden*(*n*), "in order to transfer property by gift, there must either be a deed or instrument of gift(*o*), or there must be an actual delivery of the thing to the donee."

Deed—when required by the statute law.

Under the statute law, the transfer of certain kinds of property is expressly required to be by deed.—In confirmation of which remark, it will be sufficient here to specify three important recent enactments, which contain provisions to that effect:—First, the Real Property Amendment Act (8 & 9 Vict. c. 106), the 3rd section whereof provides, that a *feoffment* (unless made under a custom by an infant) shall be void at law if not evidenced by deed—that a *partition, exchange* (except of copyholds), or *lease* required by law to be in writing, an *assignment* of a chattel interest (not being copyhold), or a *surrender* in writing of an interest in any hereditament not being a copyhold and not being an interest which might by law have been created without writing, shall also be void at law unless made by deed (*p*).

2. Under the Companies Clauses Consolidation Act (8 & 9 Vict. c. 16), s. 14, the *transfer of shares* in any undertaking to which the provisions of that Act are applicable "shall be by deed duly stamped"(*q*).

3. Under the Merchant Shipping Act(*r*) (17 & 18 Vict. c.

(*m*) *Shower* v. *Pilck*, 4 Exch. 478.

(*n*) *Irons* v. *Smallpiece*, 2 B. & Ald. 552. See *Congreve* v. *Evetts*, 23 L. J., Exch., 273.

(*o*) The expression here attributed to the learned Judge seems to imply that the assignment of a chattel may be effected by an instrument *not* under seal—a proposition unsustainable by the authorities: see per *Maule*, J., *Lunn* v. *Thornton*, 1 C. B. 381-2, and note by Serjt. Manning, Id. 381 (*d*).

(*p*) See Sugd. Essay on the New Stats. &c., p. 286; Shelf. Real Prop. Stats. 5th ed. p. 536.

(*q*) See also the Joint Stock Companies Registration Act, 7 & 8 Vict. c. 110, s. 54.

(*r*) This Act comes into operation on the 1st of May, 1855.

104), s. 55, the transfer of any registered ship, or any share therein, to a person qualified to be owner of a British ship, is to be effected by bill of sale or instrument *under seal*, in the form given in the Schedule to the Act. And the statute in question likewise contains provisions regulating the mode of mortgaging a ship or any share therein, and of making a transfer of such mortgage, for either of which purposes a deed is expressly rendered necessary (*s*).

It would be of little use, even did space permit, to enumerate the various contracts, to the validity of which a deed or a writing not under seal is rendered necessary by the statute law. When difficulty arises in regard to any contract or transaction regulated by statute, such difficulty must always be solved by reference to the precise words of the Legislature applicable to the particular case; and general principles cannot, it is obvious, be deduced from special and arbitrary enactments. Upon this part of the subject, therefore, nothing further will here be said; and, in the ensuing Chapter, I shall proceed to speak of certain contracts required to be in writing by the law merchant.

(*s*) 17 & 18 Vict. c. 104, ss. 66, 73.

Note.—It seems clear, that the operation of sect. 83 of the Com. Law Proc. Act, 1854, will be to effect a relaxation of the strict rule *unumquodque dissolvi eodem ligamine quo ligatum est*, and thus to modify some of the conclusions arrived at in the foregoing chapter. (See the remarks upon the section above mentioned in Mr. Philips's edition of the recent Act, p. 54; and *ante*, Bk. I. Ch. 4, Sect. 1).

Whilst speaking of written agreements, the reader will observe that I have carefully abstained from noticing the Stamp Acts. Where any doubt occurs in regard to the necessity for a stamp or its amount, Mr. Tilsley's Treatise upon the Stamp Laws, with the Supplements thereto, may safely be consulted.

CHAPTER III.

OF NEGOTIABLE INSTRUMENTS (*a*).

Negotiable instrument —what.

THE term '*negotiable instrument*' will here be used to signify an instrument which may be transferred by assignment from one person to another, so as to vest a legal title to the property represented or secured by it and a right of action directly founded upon it in the transferee (*b*).

Every 'negotiable' instrument, accordingly, presents an exception to that general rule of our common law, which says, that '*choses in action*' shall not be assignable. In order to understand the meaning and scope of this rule, some few remarks are necessary.

Chose in action—what;

In the first place then what is a 'chose in action'? This question may be answered by reference to the Termes de la Ley (*c*), where we read that a chose in action "is where a man hath cause or may bring an action for some duty due to him," as an action of debt upon an obligation, an action of covenant, of trespass, or the like; and, indeed, wherever a thing is *not in possession*, but where, for recovery of it, a man is driven to his action, (and consequently enjoys *a right* merely), such thing is called a *chose in action* (*d*).

(*a*) An elementary view merely will in this chapter be attempted of the important subject above specified. The author will content himself with exhibiting a brief outline of the law applicable to it, and with pointing out from a multitude of cases those to which the attention of the student should *specially* be directed.

(*b*) See Webst. Dict. ad verb. "Negotiable;" 1 Smith L. C. 3rd ed. 258--9.

(*c*) Ed. 1708, p. 121.

(*d*) See 2 Kent Com. 7th ed. p. 413.

—not assignable.

Now, it is to be observed, that, by an ancient maxim of the common law, a chose in action cannot be granted or transferred to a stranger, so as to enable the transferee to sue upon it at law (*e*). The policy of our law being, that maintenance, suppression of right, and stirring up of suits may thus be avoided; nothing in action or entry, says Sir E. Coke (*f*), "can be granted over, for so, under colour thereof, pretended titles might be granted to great men, whereby rights might be trodden down and the weak oppressed, which the common law forbiddeth."

The rule which forbids the assignment of a chose in action applies generally as well to specialties as to simple contracts. Our law, observes a modern writer (*g*), "will not permit a person not privy to a contract to found a legal claim or remedy thereon in his own name by assignment from the party with whom the obligation was entered into. It will not permit a person to become the creditor of another, without his consent; and the reason is, not only that there are wanting the mutuality and privity (*h*) essential to constitute a contract, but that oppression and unjust litigation would be encouraged, if persons—strangers to the stipulating party—(and with whom, perhaps, he would not have contracted) could purchase causes of suit, and divest the original creditor of his legal right of action" (*i*).

(*e*) Co. Litt. 266. a.; per *Maule*, J., *Tempest* v. *Kilner*, 2 C. B. 308; *Jones* v. *Carter*, 8 Q. B. 134, with which may be compared *Jones* v. *Robinson*, 1 Exch. 454.

(*f*) Co. Litt. 214. a.; *Lampet's case*, 10 Rep. 48 a.

(*g*) Chitt. jun. on Bills, vol. 1, p. 30.

(*h*) Ante, pp. 310, 323.

(*i*) It appears to be the duty of a debtor in many cases, as in debt on bond, to find out his creditor, if he be within the realm. This duty would be one very difficult of performance on the part of the debtor, if choses in action were assignable. Hence, perhaps, one reason why such assignments are not allowed at common law: Note (*a*), 6 C. B. 290.

Such being the rule of law, an interesting question may here suggest itself, viz. whether a chose in action, not assignable under the Law Merchant or by statute, could, at its original creation, be made so by the express contract and intent of the parties to it. We may, with reason, conclude, that this could not be done; for, although in general the express terms of a contract constitute the law by which the rights of the contracting parties must be regulated, it does not seem to be competent for them to attach to their engagements qualities *not recognised by law as inherent in them*, any more than it is competent to a man capriciously to attach conditions to land, which are opposed to the doctrines or spirit of our law (*j*). It seems to be a true and unimpeachable proposition, that a parol contract, as for the payment of money, cannot be endowed with a negotiable quality at the mere will of the parties to it, without reference to the recognised forms and usage of the Law Merchant.

To the rule above stated with reference to the assignment of choses in action, certain exceptions have been allowed; for instance, Courts of law were not bold enough to tie up the property of the Crown, or to prevent it from being transferred, so that the transferee might sue for it in his own name (*k*). In the event of death, bankruptcy (*l*), or marriage, an assignment of a right of action may occur. Where a covenant runs with land, the right to sue upon it passes from assignee to assignee of the term or reversion, though it is observable that in this case a peculiar kind of privity—viz. that of estate—is created between the parties. Further, under particular Acts of Parliament, certain instruments,

(*j*) Ante, p. 9.

(*k*) Termes de la Ley (ed. 1708), "Chose in Action;" per *Buller*, J., *Master* v. *Miller*, 4 T. R. 340.

(*l*) See particularly the 12 & 13 Vict. c. 106, s. 188.

ex. gr. railway bonds (in some cases); bail bonds; and replevin bonds, have been made assignable (*m*).

The most important classes of instruments, however, in regard to which the technical rule under consideration does not hold, are bills of exchange and promissory notes, when drawn, made, and indorsed in a manner which will presently be pointed out. The instruments just named are, indeed, altogether anomalous, and such as the common law, acting consistently with its ancient principles, would not sanction. They are the creatures of, and owe their origin to, the Law Merchant, to mercantile custom gradually recognised, sanctioned, and reduced to a certain uniform system by the decisions of our Courts of justice, and in part by legislative interference (*n*).

To the Italian merchants, the introduction of bills of exchange into use amongst the mercantile community of Europe is referable (*o*), these instruments having been known as early as the 14th century, although, as remarked by an able writer (*p*), the first case relating to them to be found in our Reports is that of *Martin* v. *Boure* (*q*), decided in the Exchequer Chamber, in the first year of James I.

In the infancy of our commerce, when its true interests were but imperfectly understood, Courts of law seem to have been reluctant to give their full effect to bills of exchange, and allowed them only between merchants (*r*), the reluct-

(*m*) Broom's Pract., vol. 1, p. 202; *Vertue* v. *East Anglian R. Co.*, 5 Exch. 280; *East. Union R. Co.* v. *Cochrane*, 9 Exch. 197. See *Thompson* v. *Bell*, 3 E. & B. 236; *Selby* v. *East Anglian R. Co.*, 7 Exch. 53; 13 & 14 Vict. c. 60, ss. 5, 22, 27, 35; Smith M. L. Bk. II. Ch. 4.

(*n*) Chitt. jun. on Bills, vol. 1, p. 28.

(*o*) Roccus, by Ingersoll, pref. p. 10.

(*p*) Byles on Bills, 6th ed. pref. p. 8.

(*q*) Cro. Jac. 6.

(*r*) *Ouste* v. *Taylor*, Cro. Jac. 306; Byles on Bills, 6th ed. pref. p. 10.

ance of our Courts to recognise these instruments being doubtless manifested in order to discourage innovation, and to suppress novelties in derogation of the common law.

In order to appreciate the extent of the innovation caused by the introduction of the instruments in question, we must first consider the negotiable quality attaching to a bill of exchange, and remember that, if originally made payable to order or to bearer, it may in the one case be indorsed, and in the other delivered over, so as to vest a right of action upon the bill in any bonâ fide holder. Nor in such case is the express consent of the party primarily liable on the bill at all necessary in affirmance of the holder's title. Neither is any actual privity between these parties requisite, in order to entitle the holder to sue in his own name upon the contract.

Here, then, we have an instance, complete in all respects, of the assignment of a chose in action; and if it be asked whence this assignable quality is derived, we answer, originally from the usage of merchants, which usage has been long sanctioned judicially and by Parliament, so as to form at this day a component portion of our common law.

It is not, however, solely in respect of the quality just adverted to, that a bill of exchange differs from an ordinary simple contract. It differs therefrom in another important particular, viz. that a consideration for the bill be presumed until the contrary appear, or at least until suspicion has been thrown upon the holder's title. A defendant in an action upon a bill is not permitted to call upon the plaintiff to prove the consideration which he gave for it, unless the defendant can, in the first instance, make out a primâ facie case against the holder and impeach his title, as by shewing that possession of the bill was obtained by undue means, or

that the bill has been lost, or was originally infected with illegality (*s*).

The above being the two principal points in respect of which a bill of exchange differs from a written contract not negotiable, I will now proceed to examine the nature of this instrument, its form, and leading properties.

Bill of exchange—how defined.

A bill of exchange then is a *written order* or *request* by one person to another for the *payment of money at a specified time, absolutely and at all events* (*t*).

Let us briefly examine the various parts of the definition just given:—

A bill of exchange must be *in writing*, for so the usage of merchants requires (*u*). It seems also to be essential to the validity of a bill, that it should be addressed, or in some manner specifically directed, to the party who is ordered or requested to pay, in other words, that it should have a drawer and a drawee (*x*). A written *authority* to pay money on account of the person giving it will not constitute a valid bill, although it may be evidence of an agreement (*y*). A bill must be for the payment of *money*. An order for the *delivery of goods* to a third party, although worded in other respects like a bill of exchange, could not be declared upon as such, nor would it have any similar or analogous properties. Neither would a written order to pay money and to *some other act* be a good bill (*z*).

(*s*) Byles on Bills, 6th ed. pp. 92-3; Per *Pollock*, C. B., *May* v. *Seyler*, 2 Exch. 566; post.

(*t*) See Bayley on Bills, 6th edit. p. 1; Kent Com. 7th edit. vol. 3, p. 86.

(*u*) "A bill of exchange," says Lord *Hardwicke*, "is a contract of a very particular nature, depending on the custom of merchants, and *must be in writing*:" *Thomas* v. *Bishop*, Rep. temp. Hardw. 2; *Claxton* v. *Swift*, Lutw. 878. See *Geary* v. *Physic*, 5 B. & C. 234.

(*x*) See *Peto* v. *Reynolds*, 9 Exch. 410, and cases there cited; *Stoessiger* v. *South Eastern R. Co.*, 3 E. & B. 549.

(*y*) *Hamilton* v. *Spottiswoode*, 4 Exch. 200.

(*z*) Bayley on Bills, 6th ed. p. 10;

Again, the amount for which the bill is drawn must be made payable *absolutely*, and *at all events*, for certainty is a great object in mercantile instruments. It would perplex the commercial transactions of mankind if negotiable securities were issued out into the world incumbered with conditions and contingencies, and if the persons to whom they were offered in negotiation were obliged to inquire when those uncertain events would probably be reduced to a certainty; and, accordingly, unless they carry their own validity on the face of them, and conform to what is recognised by mercantile custom, they will not be negotiable(*a*). In *Alexander* v. *Thomas*(*b*), the bill upon which the plaintiff sued was made payable "ninety days after sight, *or when realised;*" and the insertion in the bill of these latter words led after verdict to an arrest of judgment, on this short ground,—that the bill was made payable on a contingency, and was not, consequently, "a good bill of exchange drawn according to the custom of merchants." Such an instrument cannot then be made payable on a contingency, which may never happen; it must be payable at a time certain, or at sight, or at so many days after sight, or at all events on the happening of an event which must at some period take place, as so many months (by which will be understood *calendar* months(*c*)) after the death of A. B.(*d*).

Story on Bills, p. 53; *Martin* v. *Chauntry*, Stra. 1271; *Follett* v. *Moore*, 4 Exch. 410; which cases decide, in regard to promissory notes, the point above stated.

(*a*) *Carlos* v. *Fancourt*, 5 T. R. 485, 486.

(*b*) 16 Q. B. 333; per Cur. *Dawkes* v. *Lord Deloraine*, 2 W. Bla. 782. The cases upon the above subject are collected in Story on Bills, ss. 46, 47.

(*c*) Per *Littledale*, J., *Reg* v. *Chawton*, 1 Q. B. 250; Bayley on Bills, 6th ed. p. 244. But, except in the case of mercantile instruments, the word 'month' signifies in law a lunar month: Id. ibid.; *Simpson* v. *Margitson*, 11 Q. B. 23.

(*d*) *Cook* v. *Colchan*, Stra. 1217; *Storm* v. *Stirling*, 23 L. J., Q. B., 298.

Form of bill.

Such being the definition of a bill of exchange, it will be convenient to observe its ordinary form, which is as under:—

"London, 1st January, 1855.

"[Three] months after date [*or*, On demand, *or*, At sight, *or*, At [ten] days after sight], pay C. D. or order [*or*, bearer], [*or*, pay to my order] One Hundred Pounds(*e*).

A. B."

"To Mr. E. F. Merchant,
"Park Street, Bristol."

In the corner of the above instrument is usually written, in figures, the amount [100*l.*], for which the bill is payable(*f*); and it is essential to remark, that it must be stamped according to the statutory scale of duties now in force(*g*).

Its use in mercantile transactions.

Without pausing in this place to examine minutely the requisites of a bill of exchange in regard to form, let us proceed to consider its practical use. The use of negotiable paper in commercial dealings is very well illustrated by Sir W. Blackstone in his Commentaries(*h*), and by Chancellor Kent(*i*). Let us suppose that B., residing at Liverpool, wishes to receive 1000*l.*, which await his orders in the hands of F. at New York. He applies to D., going from Liverpool to New York, to pay him the above amount less the usual rate of discount, and to take his draft or bill on F. for the 1000*l.*, payable at sight. Now, this arrangement may, in truth, accommodate both B. and D., for B. receives

(*e*) The words "for value received," being inoperative, are omitted in the form here given, although usual in practice.

Across the bill is written the acceptance thus: "Accepted E. F."

(*f*) As to the effect of a variance between the amount written in the body of the bill, and that specified in the margin, see *Saunderson* v. *Piper*, 5 Bing. N. C. 425.

(*g*) 17 & 18 Vict. c. 83, Sched.; Tilsley's New Stamp Acts, 4th ed. pp. 80—82.

(*h*) Vol. 2, p. 466.

(*i*) 3 Kent Com. 7th ed. p. 87.

the amount of his debt on transferring it to D., and D. carries his money across the Atlantic in the shape of a bill of exchange without danger or risk in the transportation, and, on arriving at New York, he presents his bill to F. and is paid. The bill of exchange operates then in this way, that, if *accepted*, it effects a transfer of the right of action as against F. (the party originally indebted) from B. to D.

The illustration thus given by Sir W. Blackstone at once introduces to us the three immediate parties to a bill of exchange as originally drawn, and before it has been put in circulation, viz. B., the *drawer* of the bill; F., the *drawee* and (should he accept the bill) *acceptor;* D., the *payee.* Of these F. is the party primarily liable at suit of the payee, and B. is (with reference to F.) to be regarded in the light of a surety, and will be liable to D. in case of the non-acceptance or non-payment of the bill by F.

In connection with the remark just made, it will, however, be convenient at once to observe, that an *accommodation* bill—that is, a bill accepted without consideration for the convenience of the drawer, and with a view to his raising money upon it, or otherwise using it (*j*)—stands on a somewhat peculiar footing, inasmuch as in this case there is an implied undertaking on the part of the drawer to indemnify the acceptor against claims which may be made upon him in respect of the bill; and upon this implied contract of indemnity an action will lie against the former of these parties at suit of the latter, if obliged to take up the bill (*k*). Even in the case of an accommodation bill, how-

(*j*) See Byles on Bills, 6th ed. p. 323.

(*k*) *Beech* v. *Jones*, 5 C. B. 696; *Sleigh* v. *Sleigh*, 5 Exch. 514; *Reynolds* v. *Doyle*, 1 M. & Gr. 753; Judg. *Jones* v. *Broadhurst*, 9 C. B. 181; *Driver* v. *Burton*, 21 L.J., Q.B., 157. See, also, the title "No Consideration," post.

ever, the drawer is not *primâ facie* the party to pay it; upon the face of such a bill, the party who is bound to pay is the accommodation acceptor(*l*).

But the use of mercantile instruments, such as I am now speaking of, would be attended with very limited advantage if restricted to the immediate parties to them, *i. e.* if they were devoid of the quality of *negotiability*, which, in point of fact, they usually possess. This negotiable quality is indeed inherent by mercantile custom in bills of exchange when drawn in the ordinary form, *i. e.* where such instrument is stated on the face of it to be payable to C. D. or 'bearer,' or to 'order' of the payee(*m*), in the former of which cases it will pass like a bank note by *delivery*, whilst in the latter it requires the *indorsement* of the payee to make it negotiable. It here, accordingly, becomes necessary to advert to the precise form and effect of an indorsement of a bill.

An indorsement may be *in blank* or *special*: if in blank, it is effected by the holder merely writing his name on the back of the bill; if special, the indorser names the payee to whose order it is to be payable. Now the great difference between these two modes of indorsement is this—that, if the payee merely write his name on the back of a bill payable to order, *i. e.*, if he indorse it in blank, it thereupon becomes payable to any bonâ fide holder; whereas, if the payee indorse the bill specially, *i. e.* make it payable to 'C. D. or order,' it will require C. D.'s indorsement, either in blank or special, before it becomes again assignable, so as to convey a right of action in respect of it to the next holder(*n*).

(*l*) Per *Jervis*, C. J., *Jewell* v. *Parr*, 13 C. B. 914.

(*m*) See the form, ante, p. 448. A bill made payable to C. D., but not to 'order' or to 'bearer,' would not be negotiable.

(*n*) *Cunliffe* v. *Whitehead*, 3 Bing. N. C. 828; post, pp. 464 5

When a bill of exchange has been indorsed over we have two new characters, that of indorser and that of indorsee, brought to notice, and we must therefore briefly inquire what are the respective rights and liabilities of those parties.

Now, on the one hand, "a transfer by indorsement vests in the indorsee a right of action against all the parties whose names are on the bill in case of default of acceptance or of payment" (*o*); and, on the other hand, "every indorser of a bill is *in the nature of a new drawer*, and is liable to every succeeding holder in default of acceptance or payment by the drawee" (*p*). This last-named party being still *primarily* liable upon the bill, the drawer and each indorser thereof being *collaterally* liable to the holder, *provided certain steps rendered necessary by the law merchant* be duly taken by him.

Steps to be taken by holder of bill when due.

In order to shew what these preliminary steps are and what course should be adopted by the holder of a bill when it falls due, let us suppose that it is payable to order—that it has been accepted and indorsed in proper form—that it has come into the holder's hands neither in its inception nor during its transfer tainted with illegality or fraud. Immediately such a bill becomes due—that is, under ordinary circumstances, on the fourth day inclusive, or on the third day exclusive, of that on which the bill is expressed to be payable—the holder should *present* it, or cause it to be presented, for payment to the acceptor. If on presentment the bill be refused payment, then *notice of dishonour* should be given to every party (other than the acceptor) whose name appears upon the bill, and against whom the holder may wish to secure a remedy.

Presentment.

Notice of dishonour.

So essential, indeed, are presentment and notice of dis-

(*o*). Byles on Bills, 6th ed. p. 119. (*p*) Id. p. 117.

honour to the success of an action against any party to the bill intermediate between the holder and the acceptor, that such action will in general fail if either of the preliminary steps just specified has been omitted, *i. e.* if the bill has not been presented for payment on the day when it became due, or if proper notice of dishonour has not been given.

From what has just been said, it will be seen in how different a position relatively to the holder stands the acceptor of a bill (drawn and accepted according to the form given at p. 448) from that in which any intermediate party to it is placed; for the engagement entered into by the acceptor is to pay the bill at maturity, or at any time after maturity until his liability may have become barred by the Statute of Limitations. The acceptor, therefore, will not be discharged by non-presentment of the bill when due; nor, of course, can he require notice of dishonour(*q*).

In the very elaborate judgment delivered by the Court of Common Pleas in *Jones* v. *Broadhurst*(*r*), the legal relation subsisting between the parties to a bill is fully commented on and explained. It is to be observed, the Court there remark, that the drawer and acceptor are parties to the same instrument as contractors with each other, and not as joint-contractors with a third person; and that by the indorsement of the bill independent and differ-

(*q*) In *Heylyn* v. *Adamson*, 2 Burr. 669, the question was solemnly debated, whether, in an action by indorsee against the payee and indorser of a bill, notice of dishonour must be given to the *drawer* (not being payee), it was there finally settled that no such notice is necessary, although the indorsee must prove a demand upon and due diligence to obtain payment from the acceptor. Lord *Mansfield's* judgment in this case, exhibiting some of the elementary principles applicable to bills of exchange and promissory notes, is well worthy of perusal.

(*r*) 9 C. B. 173.

ent contracts arise on the respective parts of the drawer and the acceptor with the indorsees. The acceptor is primarily and absolutely liable to pay the bill according to its tenor. The drawer is liable only upon the contingencies of the acceptor's or drawee's making default, *and* of the holder's performing certain conditions precedent—such as presenting the bill according to its tenor, and giving due *notice* of the failure of the acceptor or drawee to pay upon a proper presentment (*s*).

So requisite, indeed, is notice of dishonour to the maintenance of an action against any of the intermediate parties to a bill, that it is now a settled rule, that "knowledge of the probability, however strong, that a bill of exchange will be dishonoured, cannot operate as a notice of dishonour, or dispense with it" (*t*). Nor will mere knowledge of the fact, that the bill has been dishonoured, be equivalent to notice, for "notice means something more than knowledge" (*u*). Besides, it is quite competent to the holder of a bill to give credit to the acceptor, and the effect of this, in accordance with a well-known principle of law, would be, to discharge the parties collaterally liable on the bill. Some intimation accordingly must be given by the holder to any intermediate party whom he means to charge, that he does not intend to give credit to the acceptor.

Notice—when not requisite

The well-known case of *Bickerdike* v. *Bollman* (*v*), shews, however, one rather important exception to the rule requiring notice of dishonour, viz. where the action is against a party who has drawn an accommodation bill having at the

(*s*) As to the proper mode of presenting a bill, when accepted payable at a particular place, see post, pp. 460, 462.

(*t*) *Caunt* v. *Thompson*, 7 C.B 400.

(*u*) Per *Ashhurst*, J., *Tindal* v. *Brown*, 1 T. R. 167.

(*v*) 1 T. R. 405; 2 Smith L. C. 22.

time no effects in the hands of the acceptor, and who had moreover no reasonable grounds for thinking that the bill would be paid. "The law," says *Buller*, J., in that case, "requires notice to be given, for this reason, because it is presumed that the bill is drawn on account of the drawee's having effects of the drawer in his hands; and if the latter has notice that the bill is not accepted or not paid, he may withdraw them immediately. But, if he has no effects in the other's hands, then he cannot be injured for want of notice." Further, in *Carter* v. *Flower* (*x*), the Court of Exchequer observe, that every bill will be presumed to have been drawn for value received, that is, on a person who was to accept and pay by reason of having value, and if the drawer draws on one who is not his debtor, nor has received any value for the bill, he must be considered (at least primâ facie) to request him to accept and pay on account of the drawer, or, in other words, for his accommodation (*y*); and if the drawer does not provide funds in time, he necessarily knows that the bill will not be paid at maturity, and will not, therefore, be entitled to notice. But the case of an *indorser* of a bill of exchange stands on a different footing from that of a drawer. He is in the nature of a surety or guarantor of its payment on due presentment, and is presumed to know nothing about the arrangement between the drawee and drawer. He is, therefore, as a general rule, entitled to notice; nor, as against him, will the necessity for notice be dispensed with, by alleging that he indorsed without value, or had no effects in the hands of the prior parties to the bill (*z*).

(*x*) 16 M. & W. 750 1.

(*y*) Ante, p. 449.

(*z*) Judg. 16 M. & W. 751, where authorities in support of the propositions above laid down are cited. See, also, Bayley on Bills, 6th ed. pp. 293—308.

An exception has thus, for the reasons above explained, doubtless been established to the rule which requires that notice of dishonour should be given. The decision in the case of *Bickerdike* v. *Bollman*, however, as remarked in *Carter* v. *Flower* (*a*), has been "often reluctantly acquiesced in"; and the exception in question will not, we may fairly presume, be further extended by the Courts.

It can scarcely be too often repeated, that, in the particular contract created by a bill of exchange, the acceptor is regarded as the principal contractor, whilst the indorsers are looked upon as his sureties; and this mode of considering the subject should steadily be kept in view, inasmuch as it will not merely facilitate a comprehension of the forms of pleadings applicable to bills, but must conduce to a right appreciation of the liabilities of the various parties whose names are attached to such instruments.

Not only the above important principle, but also the necessity for a presentment being made and notice of dishonour being given, may readily be kept in mind by the case of *Rushton* v. *Aspinall* (*b*), where, in an action against the indorser of a bill, the omission to allege a demand of payment and refusal by the acceptor on the day when the bill fell due was held fatal even after verdict, as was also the omission to allege notice of dishonour to the defendant. But, besides these points, the general principle to which I just now alluded is well stated and explained in the course of the argument in the case referred to, where it is said, that the contract by the indorser to pay the bill is not absolute but conditional, *i. e.* it is a contract to pay in the event of a demand being made on the acceptor at maturity, and

(*a*) 16 M. & W. 748. See also *Little* v. *Slatter*, 6 Bing. 623; *Cory* v. *Scott*, 3 B. & Ald. 619, 622, 623.

(*b*) Dougl. 679; 1 Smith L. C. 334.

his refusal; and the demand just specified must therefore be made in order to render the indorser liable.

Such is the nature of the liability assumed by the *acceptor* of a bill of exchange—such the correlative right of the holder of the bill against him. Let us then, in the next place, briefly inquire what particular kind of contract or engagement is entered into by the *drawer* and by the *indorser* of a bill respectively.

The nature of the contract which the *drawer* of a bill enters into with the indorsee and holder may be thus stated, almost in the words used by the Court of Exchequer in a modern case (*c*): Where the bill is payable *after date*, the drawer undertakes that the drawee shall accept it if it is presented to him before the time of payment, and, having so accepted it, shall pay it when it is in due course presented for payment; or, if the bill should not be presented for acceptance at all, then the drawer undertakes that the drawee shall pay it when duly presented for payment. In the case of a bill made payable *after sight*, the drawer undertakes that the drawee shall, on the bill being presented to him within a reasonable time from its date, accept the same, and having so accepted it shall pay it when duly presented for payment according to its tenor (*d*).

Should the drawee make default in accepting the bill, the holder, upon the non-acceptance, followed in the case of an inland bill by notice thereof to the drawer, in the case of a foreign bill by protest and notice (*e*), acquires an immediate right of action against the drawer—a right of

(*c*) *Whitehead* v. *Walker*, 9 M. & W. 506.

(*d*) Judg. 9 M. & W. 514-5; *Allen* v. *Kemble*, 6 Moore P. C. C. 314, cited per *Martin*, B., 9 Exch. 29.

(*e*) As to the peculiar form and nature of a foreign bill, see post, p. 475.

action not in respect of any special damage caused by the non-acceptance, but a right of action *on the bill*, i.e. to recover the full amount of the bill. The effect of the refusal to accept is, that the drawee says to the holder "I will not pay your bill; you must go back to the drawer, and he must pay you." The holder thus acquires by the non-acceptance the most complete right of action against the drawer which the nature of the case admits of. He is, however, bound on failure of acceptance to give immediate notice to the drawer, and if he omits to do so he forfeits all right of action against him, not only in respect of the default of acceptance, but also in respect of the subsequent non-payment (*f*).

A bill drawn upon a third person in discharge of a present debt may in truth be regarded as an offer by the drawer, that, if the payee will give time for payment, he will give an order on his debtor (the acceptor) to pay a given sum at a given time and place. The payee agrees to take this order, and to give the time required, with a proviso that if the acceptor do not accept and pay the bill, and he the payee (or the holder of the bill) give notice to the drawer of that default, the drawer shall pay him the amount specified in the bill, with lawful interest (*g*).

The *indorsement* of a bill implies an undertaking from the indorser to the person in whose favour it is made, and to every other person to whom the bill may afterwards be transferred, similar to that which is implied by *drawing* a bill (*h*), so that every indorser is said to be in the nature of a new drawer (*i*).

(*f*) Judg. *Whitehead* v. *Walker*, 9 M. & W. 516.

(*g*) Judg. *Gibbs* v. *Fremont*, 9 Exch. 30.

(*h*) Bayley on Bills, 6th ed. p. 171.

(*i*) Ante, p. 451; per *Parke*, B., *Allen* v. *Walker*; 2 M. & W. 318; per *Littledale*, J., 5 Ad. & E. 439.

Having now suggested to the reader some general idea of the mode in which bills of exchange are used in the commercial world, of the relative positions in which the parties whose names appear on them stand towards each other, and of their mutual rights and obligations, I shall direct attention ~~now~~ more minutely to the nature of the *acceptance, indorsement, and notice of dishonour;* shall advert to the nature of a *cheque*, of a *foreign bill*, of a *promissory note*, and of a *bank note;* and specify some of the ordinary grounds of defence in actions upon such securities.

Nature of the acceptance.

In the first place, then, what is the precise nature of an *acceptance?* It is laid down, that an acceptance is an engagement to pay a bill according to the tenor of the acceptance: a general acceptance is an engagement to pay according to the tenor of the bill (*k*). This engagement is made by the drawee of the bill, or by some one *per procuration* of the drawee, or *for the honour* of the drawee or of some other party to the bill.

Let me first speak of an acceptance by the drawee of a bill.

1 & 2 Geo. 4, c. 78, s. 2.

By the statute 1 & 2 Geo. 4, c. 78, s. 2, it is enacted that "no acceptance of any *inland* bill of exchange shall be sufficient to charge any person, unless such acceptance be *in writing on such bill*, or, if there be more than one part of such bill, on one of the said parts" (*l*). With reference to this section, a curious question arose in *Lindus* v. *Bradwell* (*m*). There a bill of exchange addressed to the defendant, *W. B.*, was accepted by his wife in her own name; there was no evidence of any express authority

(*k*) Bayley on Bills, 6th ed. p. 174.

(*l*) An inland bill, however, is not usually drawn in sets or parts.

(*m*) 5 C. B. 583.

given to the wife thus to accept the bill, but there was evidence that, on the bill, after it became due, being presented to the husband, he said that he knew all about it and would pay it. He was held to be liable as acceptor (*n*).

An acceptance is either absolute or conditional, and either according to or varying from the tenor of the bill (*o*).

The effect of an acceptance may, as against the drawer, be restrained by a contemporaneous agreement in writing between the acceptor and himself (*p*); but evidence of an oral agreement qualifying its operation would be inadmissible (*q*). If a person puts his name to a blank form of bill, either as drawer or acceptor, it may be filled up with any amount which the stamp impressed upon it will bear, and he will not be allowed to shelter himself from liability by any private instructions given orally or contained in a separate document, of which the rest of the world are ignorant (*r*).

An acceptance, although varying from the tenor of the bill, will bind the person making it, but the holder of a bill which has been transferred before acceptance is entitled, from the undertaking of the drawer and indorsers, to expect an absolute acceptance by the drawee engaging for payment of the entire sum mentioned in the bill according to its tenor, specifying (if none be mentioned in the body

(*n*) As to the effect of an admission of the acceptance, see *Chaplin* v. *Lery*, 9 Exch. 531.

As to the presumption respecting the date of an acceptance, see *Roberts* v. *Bethell*, 12 C. B. 778.

As to revoking an acceptance, see *Cox* v. *Troy*, 5 B. & Ald. 474. An acceptance *may* be complete without *delivery*: *Smith* v. *M'Clure*, 5 B. & Ald. 475; *Wilde* v. *Sheridan*, 21 L. J., Q. B., 260.

(*o*) Bayley on Bills, 6th ed. pp. 177-8.

(*p*) *Bowerbank* v. *Monteiro*, 4 Taunt. 844.

(*q*) Ante, p. 380.

(*r*) Per *Pollock*, C. B., *Barker* v. *Sterne*, 9 Exch. 686, (explaining *Young* v. *Grote*, 4 Bing 253). See, also, *Montague* v. *Perkins*, 22 L. J., C. P., 187; *Temple* v. *Pullen*, 8 Exch. 389; *Awde* v. *Dixon*, 6 Exch. 869.

of the bill) a place for its payment, and expressing (if the bill be payable within a limited time after sight) the time of its presentment for acceptance; and the holder may accordingly reject any acceptance proffered which does not satisfy these conditions(*s*).

1 & 2 Geo 4, c. 78, s 1.

Again—the 1st section of the statute last cited (1 & 2 Geo. 4, c. 78) enacts, "that if any person shall accept a bill of exchange, payable at the house of a banker or other place, without further expression in his acceptance, such acceptance shall be deemed and taken to be to all intents and purposes a general acceptance of such bill; but if the acceptor shall in his acceptance express that he accepts the bill payable at a banker's house or other place only, *and not otherwise or elsewhere,* such acceptance shall be deemed and taken to be to all intents and purposes a qualified acceptance of such bill, and the acceptor shall not be liable o pay the said bill except in default of payment, when such payment shall have been first duly demanded at such banker's house or other place."

The effect of the above statutory provision(*t*) is, that a bill of exchange *drawn generally* on a party may be accepted in three different forms: either (1) generally, (2) payable at a particular banker's, or (3) payable at a particular banker's and not elsewhere.

(1). If the drawee accepts *generally,* he undertakes to pay the bill at maturity.

(2). If he accepts *payable at a banker's,* he undertakes (since the statute) to pay the bill at maturity when presented for payment *either to himself or at the banker's.*

(*s*) Bayley on Bills, 6th ed. p. 202.

(*t*) As to the state of the law upon this point prior to the passing of the stat. 1 & 2 Geo. 4, c. 78, see Judg. *Gibb* v. *Mather,* 8 Bing. 220.

(3). If he accepts *payable at a banker's and not elsewhere*, he contracts to pay the bill at maturity *provided it is presented at the banker's*, but not otherwise (*u*).

Whether a bill be accepted in one or in another of the above forms may be most material. In the first place, where a bill drawn generally on a party is accepted generally, it will be remembered (*x*) that presentment is not (unless the bill be payable at or after sight) requisite as a preliminary to charging the acceptor. "No request or presentment is necessary to charge the acceptor of a bill or the maker of a note, he is bound to pay it at maturity, and to find out the holder for that purpose" (*y*). The general rule is, that "the debtor must seek out his creditor" (*z*). And a person who guaranties payment of a bill by the acceptor, cannot defend himself on the ground of want of presentment, unless he has sustained some damage by the laches (*a*) of the holder (*b*).

Where a bill is made payable in the body at a particular place (*c*), or is accepted payable at a particular place, but is not made or accepted payable there only, the holder is not bound to present it at the banker's (*d*), in order to charge the acceptor. And, accordingly, where the holder of a bill, accepted payable at a banker's, but not made payable there only, omitted to present the same until three weeks after it was

(*u*) Judg. *Halstead* v. *Skelton*, 5 Q. B. 93-4.

(*x*) Ante, p. 452.

(*y*) Per *Parke*, B., *Walton* v. *Mascall*, 13 M. & W. 458; *Norton* v. *Ellam*, 2 M. & W. 461.

(*z*) Per *Coltman*, J., *Hitchcock* v. *Humfrey*, 5 M. & Gr. 563.

(*a*) 'Laches' has been defined to be "a neglect to do something which, by law, a man is obliged to do." Per Lord *Ellenborough*, C. J., *Sebag* v. *Abithol*, 4 M. & Sel. 462, cited per Lord *Tenterden*, C. J., 4 B. & C. 2.

(*b*) *Hitchcock* v. *Humfrey*, 5 M. & Gr. 559, 572.

(*c*) *Selby* v. *Eden*, 3 Bing. 611; *Fayle* v. *Bird*, 6 B. & C. 531.

(*d*) See the Judg., *Halstead* v. *Skelton*, 5 Q. B. 93; *Blake* v. *Beaumont*, 4 M & Gr. 7.

due, during all which time the banker had in his hands a balance in favour of the acceptor exceeding the amount of his bill, the acceptor was held not to be discharged by the failure of the banker in the interval (*e*).

Where, however, a bill is accepted payable at a particular place and "not otherwise or elsewhere," presentment at that place, though not necessarily on the very day when the bill falls due (*f*), is by the statute necessary in order that the acceptor may be chargeable.

The above statute seems to be confined in its operation to the case of an action brought against the acceptor of a bill, and not to extend to that of an action against the drawer or indorser; and, at all events, if a bill be drawn payable at a particular place, and the drawee accept it payable at that place, presentment there must be proved in an action against the drawer or indorser (*g*).

Application of doctrine of estoppel as against acceptor.

The doctrine of estoppel has some application as against the acceptor of a bill. In an action by indorsee against acceptor of a bill made payable to the order of the drawer, the defendant cannot dispute the signature of the drawer (*h*), nor can he plead that the drawer had no capacity to draw or to indorse (*i*), as by reason of her having been a married woman at the time of her drawing and of her having continued to be so until the time of her indorsing the bill; in such a case the defendant cannot "blow hot and cold;' having, by his acceptance, undertaken to pay to the order

(*e*) *Turner* v. *Hayden*, 4 B. & C. 1; *Sebag* v. *Abitbol*, 4 M. & Sel. 462.

(*f*) See *Rhodes* v. *Gent*, 5 B. & Ald. 244, 246.

(*g*) *Gibb* v. *Mather*, 8 Bing. 214, 221; Byles on Bills, 6th ed. 167; and see Story on Bills, p. 415; Smith M. L. 4th ed. p. 223.

(*h*) *Sanderson* v. *Collman*, 4 M. & Gr. 209.

(*i*) *Hallifax* v. *Lyle*, 3 Exch. 446; *Prince* v. *Brunatte*, 1 Bing. N. C. 435, 438; *Taylor* v. *Croker*, 4 Esp. 187; *Pitt* v. *Chappelow*, 8 M. & W. 616; *Braithwaite* v. *Gardiner*, 8 Q. B. 473.

of the drawer, he cannot, when sued as acceptor, set up her incapacity, existing at the time of his acceptance, to make an order (*k*). The acceptor of a bill is not, however, estopped from pleading her own coverture at the date of the acceptance (*l*). Nor is the acceptor estopped from denying the handwriting of an indorser, or his ability to indorse (*m*).

Acceptance per procuration.

Where a bill of exchange is accepted or indorsed *per procuration* (*n*), these words give notice to all persons that the agent is acting under a special and limited authority, and the party holding such a bill has to establish the existence of the authority (*o*). A person taking a bill thus accepted (*p*) or indorsed (*q*) will, therefore, if prudent, make inquiry as to whether or not the special authority confided to the agent has been properly pursued; should it turn out that the agent has exceeded his authority in accepting or indorsing the bill, the holder of the bill will have no redress as against the supposed principal. If, however, a bill be addressed to a firm, and accepted "per proc.," though really without authority from the firm, by one of the partners in his individual name, the party signing the bill will clearly be liable upon it (*r*). And if a bill be drawn upon a person who is a member of a firm, and who, having no right to accept bills for the firm, nevertheless affects to accept it for them, the legal consequence is, that the drawee will be bound, but not the firm (*s*). A stranger who accepts a bill

(*k*) *Smith* v. *Marsack*, 6 C. B. 486. See *Lord* v. *Hall*, 8 C. B. 627.

(*l*) *Cannam* v. *Farmer*, 3 Exch. 698.

(*m*) *Smith* v. *Chester*, 1 T. R. 654.

(*n*) Ante, p. 458.

(*o*) Judg., *Grant* v. *Norway*, 10 C. B. 688-9.

(*p*) *Attwood* v. *Munnings*, 7 B. & C. 285; per *Park*, J., *Withington* v. *Herring*, 5 Bing. 458.

(*q*) *Alexander* v. *Mackenzie*, 6 C. B. 766.

(*r*) *Owen* v. *Van Uster*, 10 C. B. 318, and cases there cited.

(*s*) *Nicholls* v. *Diamond*, 9 Exch. 154.

per procuration of the drawee without his sanction, may be liable in an action of tort for the misrepresentation of which he has been guilty towards the holder (*t*).

Acceptance for honour.

For the purpose either of promoting the negotiation of a bill where the drawee's credit is suspected, or to save the reputation and prevent the suing of some of the parties to a bill where the drawee either cannot be found, is not capable of making himself responsible, (ex. gr. by reason of his infancy,) or refuses acceptance, an acceptance by a stranger is not uncommon; this is called an acceptance *for the honour of* the person on whose account it is made, and enures to the benefit of all the parties subsequent to that person (*u*). An acceptance for honour offers, accordingly, an exception to the general rule, that he alone can accept a bill and render himself responsible upon it as acceptor to whom it is addressed (*x*).

If the acceptor for honour pay, he is entitled to have recourse for repayment to the person for whose honour he accepted, and to all other parties to the bill who are liable to that person (*y*).

Indorsement.

The *indorsement* of a bill, as already stated (p. 450), may be *in blank* (*z*) or it may be *special*. By a blank in-

(*t*) *Polhill* v. *Walter*, 3 B. & Ad. 114.

(*u*) Bayley on Bills, 6th ed. p. 178.

(*x*) See *Polhill* v. *Walter*, 3 B. & Ad. 114, 122; *Davis* v. *Clarke*, 6 Q. B. 16.

(*y*) Bayley on Bills, 6th ed. p. 181. As to the nature of an acceptance for honour see further, *Williams* v. *Germaine*, 7 B. & C. 468, 477; *Hoare* v. *Cazenove*, 16 East, 391; 6 & 7 Will. 4, c. 58.

(*z*) If a bill or note be for less than 5*l*. the indorsement must mention the name and place of abode of the indorsee, bear date at or before the time of making it, and be attested by a subscribing witness: 17 Geo. 3, c. 30, s. 1 (made perpetual by the 27 Geo. 3, c. 16). See also the following restraining enactments, viz.:— Stat. 15 Geo. 3, c. 51; and stat. 48 Geo. 3, c. 88; and see Tilsley's New Stamp Acts, 6th ed. p. 59.

If an indorsement be so worded as

dorsement, the indorser directs the bill to be paid to any lawful holder of it; by a special indorsement the indorser directs it to be paid to a particular person mentioned in the indorsement, or his order (*b*).

In either of the above cases, in order to complete the title by indorsement as between the indorser and indorsee, there must be a *delivery* to the holder, i. e. a delivery for the admitted purpose of transferring the bill (*c*). Hence, under a plea traversing the indorsement of a bill, evidence is admissible that the alleged indorser wrote his name on the bill, and delivered it to the alleged indorsee, for the express purpose of *retiring* (*d*) other bills, and on the express condition that they should be retired forthwith; and that such condition has not been complied with (*e*). Where, however, E. drew and wrote his name on the back of a bill, and delivered it to B. to get it discounted, and B. deposited it for value with T., upon the terms, that, if not redeemed by a certain day, it was to be sold, it was held that there had been a valid indorsement and transfer of the bill from E. to T. (*f*).

For the purposes of currency and the advantages flowing

to restrain the negotiability of the instrument—thus, "pay the contents to J. S. only," it is then called a *restrictive* indorsement. Such an indorsement puts an end to the negotiability of the instrument. See further as to restrictive indorsements, Smith M.L., 4th ed., pp. 409, 410; *Sigourney* v. *Lloyd*, 8 B. & C. 622.

(*b*) *Adams* v. *Jones*, 12 Ad. & E. 459, cited *Harmer* v. *Steele*, 4 Exch. 15. As to the effect of an indorsement in blank, see also *Walker* v. *Macdonald*, 2 Exch 527.

(*c*) *Marston* v. *Allen*, 8 M. & W. 494; *Adams* v. *Jones*, 12 Ad. & E. 455; *Gough* v. *Findon*, 7 Exch. 48; per *Erle*, J., *Manley* v. *Boycot*, 2 E. & B. 51; *Bromage* v. *Lloyd*, 1 Exch. 32; per *Parke*, B., *Austin* v. *Kolle*, Id. 588; *Lysaght* v. *Bryant*, 9 C. B. 46; *Harmer* v. *Steele*, 4 Exch. 1; *Morris* v. *Oliver*, 15 Q. B. 589; *Samuel* v. *Green*, 10 Q. B. 262.

(*d*) As to the meaning of this term, see *Elsam* v. *Denny*, 23 L. J., C. P., 190.

(*e*) *Bell* v. *Visc. Ingestre*, 12 Q. B. 317.

(*f*) *Barber* v. *Richards*, 6 Exch. 63. See *Lord* v *Hall*, 8 C. B. 627.

from an unchecked circulation of bills of exchange, our Law Merchant provides that a bonâ fide holder for value of a bill indorsed in blank shall not be affected by an intermediate fraud, nor bound to inquire whether the bill has been properly transferred or not. By that law, every person having possession of a bill has (notwithstanding any fraud on his part, either in acquiring or transferring it) full authority to transfer such bill, but with this limitation, that, to make such transfer valid, there must be a delivery, either by him or by some subsequent holder of the bill, to some one who receives such bill bonâ fide and for value, and who is either himself the holder of it, or a person through whom the holder claims. Anything which shews that the restriction thus imposed on the general rule applies, shews that the party making the transfer had no authority to do so, and that the transfer is not valid (*g*).

If, then, the holder of a bill puts his name on the back of it, and delivers it to his agent, who delivers it to a third person for value, that is an indorsement from the holder to such third person. And, where a bill is payable to bearer, any person who is the holder for value may sue upon it, whether the party from whom he has taken it had a title or not (*h*).

The preceding remarks are applicable to a bill payable to bearer, and transferable by delivery: where, however, indorsement is necessary to the transfer of a bill, the indorsement will convey no title except as against the person making it, unless it be made by one who has a right to make the transfer (*i*).

In case then of loss, by theft or accident, of a bill assignable

(*g*) Judgm. *Marston* v. *Allen*, 8 M. & W. 504--5; *Barber* v. *Richards*, 6 Exch. 63.

(*h*) Per *Parke*, B., *Barber* v. *Richards* supra, citing *Collins* v. *Martin*, 1 B. & P. 648.

(*i*) Bayley on Bills, 6th ed., pp. 138--9.

by mere delivery, the thief or finder may confer a title by transferring it; if it be assignable by indorsement only, he cannot confer such title, except as against himself (*k*).

From the propositions thus stated, in the words of Mr. J. *Bayley*, consequences flow, of much importance to the commercial world in general, and especially to bankers, whose principal duty consists in cashing negotiable securities on behalf of their customers.

The relation which subsists between a banker and his customer seems to be this—"The customer lends money to the banker, and the banker promises to repay that money, and, whilst indebted, to pay the whole or any part of the debt to any person to whom his creditor, the customer, in the ordinary way requires him to pay it" (*l*). The ordinary mode of paying off the debt due from the banker is by honouring cheques and bills made payable at the bank, where he has authority from his customer for that purpose.

When a bill is accepted payable at a banker's, the making the acceptance payable there is tantamount to an order on the part of the acceptor to the banker to pay the bill to the person who is, according to the Law Merchant, capable of giving a good discharge for it. If the bill is payable to order, it is an authority to pay the bill to any person who becomes holder by a genuine indorsement. If the bill is originally payable to bearer, or if it afterwards receive a genuine indorsement in blank, the acceptance constitutes an authority to the banker to pay the bill to the person who seems to be the holder (*m*).

A banker, however, who pays a bill bearing a forged indorsement, cannot charge his customer with the amount (*n*),

(*k*) Id. ibid.; post, p. 489.

(*l*) Per *Alderson*, B., 16 Q. B. 575. See *Pott* v. *Clegg*, 16 M. & W. 321; *Thompson* v. *Bell*, 10 Exch. 10; *Tassell* v. *Cooper*, 9 C. B. 509.

(*m*) *Roberts* v. *Tucker*, 16 Q. B. 560.

(*n*) Ibid. As to the banker's remedy against the person presenting

for "the general rule is, that no title can be obtained through a forgery" (*o*). And should the banker wish to avoid the responsibility of deciding on the genuineness of indorsements, he may require his customers to domicile their bills at their own offices, and to honour them by drawing cheques upon the bank. It seems, moreover, reasonable to say, that where a bill, bearing a suspicious indorsement, is presented for payment to a banker, he will be justified in deferring payment of the bill for a reasonable time, in order that he may make inquiries as to its genuineness (*p*).

A *cheque* is, in fact, an inland bill of exchange, drawn upon a banker and *payable to bearer* (*q*). This particular kind of instrument is, consequently, subject, in general, to the same rules as regulate the rights and liabilities of parties to bills of exchange, modified, however, by certain customs and usages which have been engrafted on the law applicable to bills and hold in regard to cheques exclusively (*r*).

As in the case of an ordinary bill of exchange, so in that of a cheque, a banker has no authority from his principal to

the bill, see *Cocks* v. *Masterman*, 9 B. & C. 902.

As to the liability of a banker who, by mistake, cancels the acceptance on a bill, which he afterwards receives orders not to pay, see *Warwick* v. *Rogers*, 5 M. & Gr. 340; *Robson* v. *Bennett*, 2 Taunt. 388.

(*o*) Per *Tindal*, C. J., *Johnson* v. *Windle*, 3 Bing. N. C. 229.

(*p*) See *Robarts* v. *Tucker*, 16 Q. B. 577—579.

(*q*) See Byles on Bills, 6th ed., p. 10.

A cheque is not usually expressed to be payable "on demand." See *Doe* d. *Church* v. *Pontifex*, 9 C. B. 229.

Being payable to bearer, a cheque passes by delivery (see *Samuel* v. *Green*, 10 Q. B. 262; *Simpkins* v. *Pothecary*, 5 Exch. 253). It is not ordinarily indorsed or accepted.

(*r*) Of such usages, one of the most remarkable is that of crossing the cheque with a banker's name, or with the words "& Co.;" the precise meaning and effect whereof were much considered in *Bellamy* v. *Marjoribanks*, 7 Exch. 389.

The days of grace are not allowed upon a cheque: Story on Promissory Notes, s. 490.

As to stamping cheques under the stat. 17 & 18 Vict. c. 83, see Tilsley's New Stamp Acts, 6th ed, pp. 60, 120 c.

pay any such draft unless signed or authenticated by him and presented by some party who can give a lawful discharge for it: a banker, therefore, who pays a forged cheque, will clearly have to bear the loss himself, and cannot throw it on his customer. So, if a banker pays a cheque which has been fraudulently altered as regards the amount, he will have to suffer, unless he can shew that the party out of whose funds and on whose behalf he assumed to pay, by his own gross negligence and laches, facilitated the commission of the fraud (*s*).

Undoubtedly, says *Best*, C. J. (*t*), a banker who pays a forged cheque is in general bound to pay the amount again to his customer, because in the first instance he pays without *authority*, and because it is the duty of the banker to be acquainted with his customer's handwriting. But, though that rule be perfectly well established, yet if it be the fault of the customer that the banker pays what he ought not to pay, the latter cannot be called on to pay again.

To a like effect, in another case (*u*), *Bayley*, J., observes, that "the banker, as the depositary of the customer's money, is bound to pay from time to time such sums as the latter may order (*v*). If, unfortunately, he pays money belonging to the customer upon an order which is not genuine, he must suffer; and, to justify the payment, he must shew that the order *is* genuine, not in signature only, but in every respect." In the case which gave occasion to these remarks, the cheque out of which the action originated had been altered by the holder, so as to indicate a much larger sum as payable under it than it had in the first instance been drawn for; the cheque

(*s*) *Young* v. *Grote*, 4 Bing. 253, commented on and explained per *Pollock*, C. B., *Barker* v. *Sterne*, 9 Exch. 686-7; *Johnson* v. *Windle*, 3 Bing. N. C. 225, 229.

(*t*) *Young* v. *Grote*, supra.

(*u*) *Hall* v. *Fuller*, 5 B. & C. 757.

(*v*) See *Marzetti* v. *Williams*, 1 B. & Ad. 415; *Rolin* v. *Steward*, 14 C. B. 595.

so altered was paid by the banker, who then claimed to charge his customer with the difference between the two amounts. It was held, by applying the principle of law already stated, that he was not justified in doing so, there having been no laches in the customer.

For further information as to the rights of the holder of a worthless cheque or bill payable to bearer, and transferred without the indorsement of the transferor, the reader is referred to the remarks hereinafter made in regard to the transfer of bank notes and to the defence of "no consideration" by way of answer to an action on a bill or note.

With regard to the indorsement of a bill of exchange a few additional observations will suffice. The transfer of a bill by indorsement may be either before or after acceptance, either before or after it has arrived at maturity. If a bill be indorsed over before it is due, but after acceptance has been refused, the indorsee taking the bill with knowledge of its having been dishonoured will be liable to the same objections as might have been raised against his indorser (*x*). If an acceptor pay a bill at maturity, the effect of so doing is to take it altogether out of circulation, the bill "has done its work and is no longer a negotiable instrument. No person could sue on it; no person remains liable on it. If put into circulation again, it becomes a new bill payable at sight, and must have a fresh stamp"(*y*). Where, however, an indorser retires a bill, he merely withdraws it from circulation in so far as he himself is concerned, and may hold the bill with the same remedies as he would have had if in due course he had been called upon to pay, and had paid, the

(*x*) Bayley on Bills, 6th ed. p. 163. See *Goodman* v. *Harvey*, 4 Ad. & E. 870.

(*y*) Per Ld. *Denman*, C.J., *Lazarus* v. *Cowie*, 3 Q. B. 465 (commented on per *Maule*, J., *Jewell* v. *Parr*, 13 C. B. 916–7); *Holroyd* v. *Whitehead*, 1 Marsh. 128; Stat. 55 Geo. 3, c. 184, s. 19. See *Morley* v. *Culverwell*, 7 M. & W. 174.

amount to his immediate indorsee (*z*). An indorser therefore who pays a bill may subsequently indorse or negotiate it (*a*).

Again, where a bill of exchange, indorsed in blank for value before it is due, is transferred by the indorsee after it has become due, by delivery only, without any fresh indorsement, the transferee takes, as against the acceptor, any title which the intermediate indorsee possessed at the date of the indorsement to him (*b*). And where an overdue bill is transferred by indorsement, the indorsee "takes it subject to all the equities with which it was incumbered while in the hands of the person from whom he received it" (*c*). But the bonâ fide holder of a bill or note cannot be prejudiced in the rights which he, primâ facie, has according to the terms of the instrument by knowledge subsequently communicated to him after he has become the holder of it, or even by knowledge which he has at the time when he takes it, if there is no evidence of a special agreement at such time to affect the rights and liabilities of the parties (*d*).

In an action by indorsee against indorser, the latter is not (it seems) *estopped* from denying the drawing of the bill and its indorsement to himself, although the fact of his own indorsement being on the bill will be almost conclusive as to the drawing and prior indorsement (*e*).

(*z*) *Elsam* v. *Denny*, 23 L. J., C. P., 190.

The effect of payment of a negotiable instrument is further considered, post, p. 494.

(*a*) Bayley on Bills, 6th ed., p. 167; *Callow* v. *Lawrence*, 3 M. & Sel. 95; with which compare *Beck* v. *Robley*, 1 H. Bl. 89, n.

(*b*) *Fairclough* v. *Pavia*, 9 Exch. 690.

(*c*) Smith M. L., 4th ed., pp. 212, 213, where cases in support of the text are collected; Byles on Bills, 6th ed. pp. 129–130; *Whitehead* v. *Walker*, 10 M. & W. 696; Story Prom. Notes, 2nd ed., p. 216; *Carruthers* v. *West*, 11 Q. B. 143; *Lloyd* v. *Howard*, 15 Q. B. 995; *Harmer* v. *Steele*, 4 Exch. 1.

(*d*) Judg. *Manley* v. *Boycot*, 2 E. & B. 56.

(*e*) *Armani* v. *Castrique*, 13 M. & W. 443. See *The E. I. Co.* v. *Tritton*, 3 B. & C. 280. Sed *quære*.

Notice of dishonour.

When a bill of exchange has been presented (*f*) and dishonoured, the holder may either resort to his immediate indorser, giving him due notice of dishonour, or he may resort to any or all of the other indorsers or prior parties intermediate between him and the acceptor, whose names appear upon the bill, giving to each of these parties respectively notice of dishonour in the same manner as if each were the sole indorser (*g*); subject, however, to this qualification, that the holder may avail himself of any notice which has been given in due time by any previous indorser, who at the time of giving such notice was under liability to the holder (*h*).

The effect of the qualification just specified is explained, and the question, *within what time* must notice of dishonour be given, is answered by Mr. Justice *Maule* in a recent case (*i*). "The rule," says that learned Judge, "is that the party who is sought to be charged upon the bill is entitled to prompt notice of its dishonour by the acceptor. Where the parties live in the same town, it is said that the notice must be given in time to be received in the course of the day next after the dishonour of the bill, or after the party giving the notice had himself received notice of dishonour. There must be due diligence—not that the party is bound to neglect all other business, and, the moment he receives notice, send a notice to those he means to charge. He has a whole day, and so much more as will enable him using due diligence to communicate the notice

(*f*) As to presentment, see further, post. As to presentment of a bill accepted payable at a banker's, ante, p. 460; *Wilmot* v. *Williams*, 7 M. & Gr. 1017.

(*g*) Story on Promissory Notes, s. 330.

(*h*) *Lysaght* v. *Bryant*, 9 C. B. 46; *Harrison* v. *Ruscoe*, 15 M. & W. 231; *Chapman* v. *Keane*, 2 Ad. & E. 193; *Wilson* v. *Swabey*, 1 Stark. 34. See also Bayley on Bills, 6th ed., p. 251.

(*i*) *Rowe* v. *Tipper*, 13 C. B. 249, 256.

to the party sought to be charged. A day is not in all cases the limit. If there are many indorsers, and the notice in fact travels through them all—if there has been no want of diligence between any two of them—whatever time is occupied the notice will be good. . . . . The rule is not that each indorser has a day, but the rule is, that *due diligence shall be observed* in the actual state of circumstances in which the notice is given" (*k*).

No precise form of words is necessary to constitute a good notice of dishonour, nor will a slight inaccuracy or misdescription invalidate it, provided the party to whom it is given cannot reasonably be supposed to have been misled thereby (*l*). The rule with reference to notice, laid down in *Solarte* v. *Palmer* (*m*), was, that 'such notice ought, in express terms or by *necessary implication*, to convey full information that the bill has been dishonoured.' The rule thus laid down has not, however, been strictly adhered to, and a liberal construction may be put upon the term 'necessary implication' above used.

Accordingly, a notice of dishonour, whether written or verbal, will be good which conveys to the mind of the person to whom it is addressed the three following facts, so that with common understanding he may comprehend them:—viz. 1st, that the bill was presented when due;

(*k*) As to the question, what is due diligence, see *Bateman* v. *Joseph*, 12 East, 433; *Rowe* v. *Tipper*, supra.

Under *ordinary* circumstances, each party has a day within which to give notice of dishonour. The holder has his day to give notice to any party whom he may seek to charge; and each of the prior indorsers in turn has *his* day.—Per *Burrough*, J., *Dobree* v. *Eastwood*, 3 Car. & P. 250, cited per *Jervis*, C. J., 13 C. B. 255.

(*l*) *Mellersh* v. *Rippen*, 7 Exch. 578; *Chard* v. *Fox*, 14 Q. B. 200; *Armstrong* v. *Christiani*, 5 C. B. 687; *Caunt* v. *Thompson*, 7 C. B. 400.

(*m*) 1 Bing. N. C. 194; *S. C.* 2 Cl. & F. 93.

2ndly, that it was dishonoured; and 3rdly, that the party addressed is to be held liable for the payment of it (*n*).

Where, on the day after a bill became due, the holder's clerk called upon the drawer and told him that the bill had been duly presented, and that the acceptor could not pay it, to which the drawer answered that 'he would see the holder about it,' it was held that the jury might from this conversation infer that the drawer had due notice of dishonour (*o*).

Besides questions respecting the sufficiency of notice of dishonour in point of form, others of no little difficulty present themselves in regard to the sufficiency of the proof offered of the *receipt* of the notice by the defendant, as to the degree of accuracy and explicitness which may be required in addressing it, and generally as to what will constitute reasonable diligence on the part of the holder of the bill in forwarding the notice of dishonour to the party whom he seeks to charge. Upon such points the cases below cited may usefully be consulted (*p*). And upon this

(*n*) Per *Parke*, B., *Lewis* v. *Gompertz*, 6 M. & W. 402-3; per Lord *Campbell*, C. J., *Everard* v. *Watson*, 1 E. & B. 801, (where *Solarte* v. *Palmer*, 1 Bing. N. C. 194, is commented on). In *Caunt* v. *Thompson*, ante, the cases as to the sufficiency of notice of dishonour were much considered. They seem to establish (as there observed per Cur.), that, "in order to make a prior holder responsible, he must derive—from some person entitled to call for payment—information that the bill has been dishonoured, and that the party is in a condition to sue him,—from which *he may infer that he will be held responsible:*" *Bailey* v. *Porter*, 14 M. & W. 44.

(*o*) *Metcalfe* v. *Richardson*, 11 C. B. 10, 11.

(*p*) *Burmester* v. *Barron*, 21 L. J., Q. B., 135; *Clarke* v. *Sharpe*, 3 M. & W. 166; *Housego* v. *Cowne*, 2. Id. 348.

In *Woodcock* v. *Houldsworth*, 16 M. & W. 124, *Parke*, B., says, "Notices of dishonour are generally put into the post; where that is done, although by some mistake or delay at the post-office the letter fails to reach its destination in proper time, the party who posted it ought not to be prejudiced; he has done all that was usual and necessary, and he does not guarantie the certainty or correctness of the post-office delivery."

part of the subject I would merely add that the onus will clearly lie upon the plaintiff of shewing that his right of action was complete before the commencement of the suit, *i. e.* before the issuing of the writ of summons (*q*).

The remarks to be found in this chapter respecting *inland* may readily be applied to *foreign* bills, provided the peculiar qualities attaching to instruments of this latter class are kept in view. They will here be very briefly specified.

Foreign bill —what.

A bill drawn or payable abroad, or drawn in one part of the United Kingdom and payable in another, is a foreign bill (*r*).

Such a bill is not within the 1 & 2 Geo. 4, c. 78, s. 2 (*s*), and therefore a promise, written or verbal, to pay or accept an existing foreign bill is of itself an acceptance (*t*) if the payee choose to consider it as such (*u*).

The form of a foreign usually differs somewhat from that of an inland bill; the first-mentioned being often drawn at one or more *usances:* the 'usance' being the period for payment customary as between the countries or particular places where the bill is respectively drawn and made payable (*x*).

Foreign bills, moreover, are usually drawn in sets of three, or even more, which circulate together, or of which one or more parts may be circulated whilst another is forwarded for acceptance (*y*). Each part, however, should

(*q*) *Castrique* v. *Bernabo*, 6 Q. B. 498; ante, p. 110.

(*r*) *Mahoney* v. *Ashlin*, 2 B. & Ad. 478; Story on Bills, s. 22; *Barker* v. *Sterne*, 9 Exch. 684.

(*s*) Ante, p. 458.

(*t*) Byles on Bills, 6th ed., p. 147; *Bank of Ireland* v. *Archer*, 11 M. & W. 383; *Grant* v. *Hunt*, 1 C. B. 44.

(*u*) Per Lord *Campbell*, C. J., *Gurney* v. *Behrend*, 3 E. & B. 632.

(*x*) Byles on Bills, 6th ed., p. 59. The form of a foreign bill of exchange may be seen in *Poirier* v. *Morris*, 2 E. & B. 95; *Gibbs* v. *Fremont*, 9 Exch. 25; Chitt. Bills, vol. 1, p. 2; Story on Bills, s. 26.

(*y*) Byles on Bills, 6th ed., p. 309.

specify or refer to the other parts of the set and express that payment of it is conditional on the other parts of like 'tenor and date' as itself remaining unpaid at maturity (*z*).

Again, prior to the recent statute 17 & 18 Vict. c. 83, the only foreign bills subject to duty were those drawn in but payable out of the United Kingdom; but by that Act bills drawn abroad are chargeable with duty if such bills are payable or indorsed or negotiated within the kingdom (*a*), the scale of duties payable on foreign bills being set forth in the schedule to the Act.

Another particular wherein a foreign differs from an inland bill is this, that, if acceptance or payment of it be refused, it must by the custom of merchants, in order to charge the drawer, be *protested*, the protest being a solemn declaration written by a notary under a copy of the bill, stating that payment or acceptance of it has been demanded and refused, the reason (if any) assigned for such refusal, and that the bill is consequently protested. This formality is required in case of dishonour of a foreign bill in conformity with the laws of most other countries, and because satisfactory evidence of dishonour is thus afforded to the drawer or indorsee; for foreign Courts give credit to the acts of public functionaries, in like manner as a protest under the seal of a foreign notary is good evidence of dishonour in our Courts (*b*).

Besides the peculiarities above specified as incident to foreign bills, we must remember, that, where a bill of exchange drawn in one country is payable in another, a question of much importance and difficulty sometimes presents

(*z*) Story on Bills, s. 67.

(*a*) Tilsley's New Stamp Acts, 6th ed., p. 61.

(*b*) Byles on Bills, 6th ed, chap. 19, where ample information respecting the protest and noting of foreign bills is afforded. See *Bomar* v. *Mitchell*, 5 Exch. 415.

itself—Is the *lex loci contractûs* or the *lex loci solutionis* to be applied to determine the rights and liabilities of the parties?

Let us, by way of shewing how the difficulty just alluded to may arise, first consider the case of a bill drawn abroad and accepted in this country. Here the drawer, by his contract, undertakes that the drawee shall accept and shall afterwards pay the bill, according to its tenor, at the place and domicile of the drawee, if it be drawn and accepted generally;—at the place appointed for payment, if it be drawn and accepted payable at a different place from the place of domicile of the drawee. If, then, this contract of the drawer be broken by the drawee, either by non-acceptance or by non-payment, the drawer's liability for payment of the bill will be regulated by the law existing—not where the bill was to be paid by the drawee, but—where he, the drawer, made his contract (*c*).

In accordance with the proposition just stated, it has been held, that, if a bill of exchange, on the face of which no interest is reserved (*d*), is drawn in one country payable in another, the drawer is liable on its dishonour to pay as damages interest at the current rate in the country where the bill was drawn (*e*). But although a bill drawn at A. primâ facie bears interest as a debt at A. would do if nothing else appear, yet, if that bill be indorsed at B., the indorser is a new drawer, and it may, as remarked by the Court of Exchequer in the case below cited (*e*), be a question whether

(*c*) *Allen* v. *Kemble*, 6 Moore P. C. C. 314. See *Rothschild* v. *Currie*, 1 Q. B. 43; and, generally, as to applying the lex loci contractûs, see ante, p. 45; *Ruckmaboye* v. *Mottichund*, 5 Moore P. C. C. 234.

(*d*) If a rate of interest be expressly, or by necessary implication, specified on the face of the instrument, there its amount is of course governed and regulated by the terms of the contract itself: Judg. 9 Exch. 30.

(*e*) *Gibbs* v. *Fremont*, 9 Exch. 25.

this indorsement is a new drawing of a bill at B., or only a new drawing of the same bill, that is, a bill expressly made at A. If the former view be correct, the bill thus indorsed would carry interest at the rate at B.; if the latter view be correct, it would carry interest according to the rate at A (*f*).

Again, if a bill be drawn in one country, not specifying any rate of interest, and be accepted generally in another, upon dishonour of the bill the rate of interest payable will, as against the acceptor, have to be calculated according to the law of the country of his domicile, for a contract to pay generally is governed by the law of the place where it is made (*g*). And if a bill be sent from one country by the drawer to the drawee in another, who there accepts it generally, and returns it to the drawer, the contract raised by the acceptance must be considered as made in the country of the drawee (*h*). Where, however, a bill drawn and accepted abroad is made payable here, the mode of payment, and the consequences of non-payment, will, in the absence of any express stipulation by the parties, be governed by our law (*i*).

Promissory note—what.

A *promissory note* is a written promise by one person for the payment of money to another person therein named, at a specified time, absolutely and at all events (*k*).

Before inquiring as to the nature and requisites of the above instrument, a few remarks as to its origin and the

(*f*) See the authorities upon this subject cited *Gibbs* v. *Fremont*, ante.

(*g*) Story Confl. L. 3rd ed. p. 519.

(*h*) Per *Coleridge*, J., *Wilde* v. *Sheridan*, 21 L. J., Q. B., 260.

(*i*) *Cooper* v. *Earl Waldegrave*, 2 Beav. 282; Story Confl. L. 3rd ed. p. 579.

(*k*) Bayley on Bills, 6th ed., p. 1; Story on Prom. Notes, 2nd ed., p. 1.

In *Foster* v. *Jolly*, 1 Cr. M. & R. 707, *Parke*, B., observes, that "every bill or note contains two things, value, either express or implied, and a contract to pay *at a specified time*." As to the presumption of consideration, see further, post, p. 495.

reason of its introduction amongst us may be proper. In regard to the latter part of this subject, the explanation offered by Mr. Kyd, in his Treatise on Bills of Exchange (*l*), appears satisfactory. He suggests, that, as commerce advanced, the multiplicity of its concerns sometimes rendered necessary amongst mercantile persons a less complicated mode of payment than by bills of exchange. A trader, for instance, whose situation and circumstances rendered credit from the merchant or manufacturer who supplied him with goods absolutely requisite, might have so limited a connection with the commercial world, that he could not easily furnish his creditors with a bill of exchange on another man. But his own credit and respectability might, nevertheless, be such, that his simple promise of payment (reduced to writing for the purpose of evidence) would be quite as good as a bill on another. Hence we may reasonably conjecture that promissory notes originated.

This species of security seems to have become prevalent here about the middle of the 17th century; and, according to Lord *Holt* (*m*), was an "invention of the goldsmiths in Lombard-street."

The precise mode, however, of the introduction into commercial transactions of instruments worded as promissory notes may be more accurately explained as follows:—

Prior to the year 1640, the Royal Mint seems to have served, to some extent, as a bank or place of deposit for the cash of wealthy merchants, whose custom was to leave their money there when they had no immediate occasion for it, and to draw it thence when wanted. In the year just named, however, King Charles I., as history informs us, took forcible possession of a large amount of funds which had thus been lodged in his Mint, and the merchants ceas-

(*l*) Page 18; Story on Prom. Notes, 2nd edit. p. 7. (*m*) 6 Mod. 29.

ing, consequently, to trust the Royal Mint as a place of deposit, were, shortly after the date just named, obliged to have recourse to the goldsmiths, then principally domiciled in Lombard-street, who took upon themselves to act as bankers, and, in return for the sums deposited with them, issued their notes payable to 'order' or to 'bearer,' by way of security (*n*).

It seems clear, from reported cases (*o*), that bills of exchange had, long before the time just spoken of, been in use here amongst merchants; but some difficulty exists with reference to the question whether or not promissory notes were, prior to the stat. 3 & 4 Ann. c. 9, negotiable in like manner and to the same extent as bills of exchange. We know, indeed, that Lord *Holt* strenuously opposed himself to the placing of promissory notes on the same footing as bills of exchange, and to granting similar remedies upon them (*p*); but, notwithstanding his opposition, there can be no doubt that these instruments had, during the latter half of the 17th century, been recognised in the mercantile world as negotiable, and had there been regarded in the same light as bills of exchange.

From the very obscurity, indeed, observable in the reports of cases upon bills and notes at the time in question, and from the difficulty which exists in determining in any particular case whether the instrument sued upon was in reality a bill or note (*q*), it may fairly be argued that the two classes of securities just named were then, even by lawyers, considered as mainly governed by the same rules and as dependent upon the same law—that law viz. which is recog-

(*n*) Anderson Hist. Com. Vol. 2, p. 386; Macpher. Ann. Com. Vol. 2, pp. 411, 427; Gilbart Hist. Bank. 3rd ed. pp. 21-2. See *Ward* v. *Evans*, 2 Ld. Raym. 928.

(*o*) Ante, p. 444.

(*p*) See *Clarke* v. *Martin*, Ld. Raym. 757; *Buller* v. *Crips*, 6 Mod. 29.

(*q*) See 3 Burr. 1525.

nised *amongst merchants*, and is fashioned according to their exigencies.

We must not then regard as conclusive, with respect to the question just mooted, the preamble of the statute of Anne, which declares the previously existing law as in accordance with the expressed opinions of Lord *Holt*.

When, indeed, we reflect, that, prior to the time of Lord *Mansfield*, the leading principles of mercantile law had been comparatively little investigated, and certainly had not been reduced to any system—when we reflect, that, up to that date some of the simplest points in connection with negotiable instruments had never been judicially decided (*r*), we shall hardly wonder that doubt exists as to the precise light in which promissory notes were regarded by our legal tribunals during the latter half of the 17th century (*s*). However, the general effect of the stat. 3 & 4 Ann. c. 9 (made perpetual by 7 Ann. c. 25, s. 3,) clearly was "to put promissory notes on the same footing with bills of exchange (*t*)." That statute expressly enacting (*u*)—1st, That every note payable to an individual, or 'order,' or 'bearer,' may be put in suit by the payee or holder; 2ndly, That every such note shall be transferable in like manner as a bill of exchange, and so as to vest a right of action upon the instrument as against prior parties to it in the indorsee or holder.

(*r*) See Evans' Decis. of Lord *Mansfield*, Vol. 2, pp 59—81.

It was, however, reserved for Ld. *Kenyon* to adjudicate, that the days of grace are to be allowed on a promissory note as on a bill: see *Brown* v. *Harraden*, 4 T. R. 148.

(*s*) See further upon this subject a learned note in Cranch (U. S.) R. Vol. 1, Appendix.

(*t*) Per *Ashhurst*, J., 4 T. R. 153; per Lord *Kenyon*, C. J., 5 T. R. 485.

(*u*) The wording of this statute was much considered in *Brown* v. *De Winton*, 6 C. B. 356—359; and in *Wood* v. *Mytton*, 10 Q. B. 810, 811.

A promissory note, payable by instalments, is within the statute: *Oridge* v. *Sherborne*, 11 M. & W. 374; *Carlon* v. *Kencaly*, 12 M. & W. 139.

A promissory note, indeed, even when not negotiable, enjoys by our law all the privileges of a note which is negotiable, so far as the maker and the payee are concerned(*x*); but, if such a note be indorsed by one to whom it has not been properly transferred, the transferee will have no right of action upon the note as against the transferor and indorser(*y*).

Referring to the definition of a promissory note given at p. 478, the instrument in question will at once be found to possess some important attributes in common with bills of exchange. A promissory note must be in writing(*z*); it must be for the payment of money absolutely and at all events(*a*), a written promise to pay money and to do some other act would not be a promissory note(*b*). A payee must be expressly named in the instrument, or must appear therein by necessary implication(*c*).

The ordinary form of a promissory note is as follows:—

"£100. "London, 1st January, 1855.

"[Three] months after date [*or* On demand, *or* At sight, *or* At [ten] days after sight], I promise to pay C. D. or order [*or* bearer] One Hundred Pounds. A. B."(*d*).

The person signing the above instrument is called the *maker;* the person to whom it is made payable the *payee;* when transferred by indorsement the immediate parties to

(*x*) Story on Prom. Notes, 2nd ed. p. 46; Story on Bills, p. 75.

(*y*) *Gwinnell* v. *Herbert*, 5 Ad. & E. 436; Byles on Bills, 6th ed. p. 113.

(*z*) Story on Prom. Notes, 2nd ed., pp. 12—14.

(*a*) *Clarke* v. *Percival*, 2 B. & Ad. 660, and cases there cited.

(*b*) *Follett* v. *Moore*, 4 Exch. 410; *Martin* v. *Chauntry*, 2 Str. 1271. See *Russell* v. *Phillips*, 14 Q. B. 891.

(*c*) *Brown* v. *De Winton*, 6 C. B. 336, and cases cited Id. 354, 355. See *Absolon* v. *Marks*, 11 Q. B. 19; *Enthoven* v. *Hoyle*, 13 C. B. 373, 394; *Megginson* v. *Harper*, 2 Cr. & M. 322; *Storm* v. *Stirling*, 3 E. & B. 832; *Stebbing* v. *Spicer*, 8 C. B. 827.

(*d*) As to the statutory scale of stamp duties on promissory notes, see the 17 & 18 Vict. c. 83, Sched.

such transfer are, as in the case of a bill, termed the *indorser* and *indorsee*.

No particular form of words is necessary to constitute a promissory note; and embarrassing questions may arise under the Stamp Acts or otherwise in regard to an instrument ambiguously worded, and presenting some features in common with a promissory note, others in common with an I. O. U. (*e*), with a mere acknowledgment of a debt (*f*), or with an unilateral contract, or an agreement inter partes (*g*). A promissory note, payable to the maker's own order, may, after it has been indorsed and put in circulation, be treated as a note payable to bearer (*h*), though it is not *per se* a negotiable instrument within the statute of Anne (*h*). And, where an instrument is in terms so ambiguous as to make it doubtful whether it is a bill of exchange or a promissory note, the holder will at his election be entitled to treat it as either, for the words of an instrument are in general to be taken most strongly against the party using them (*i*).

The distinction, in general structure and character, which exists between a bill of exchange and a promissory note, is thus pointed out by Dr. Story (*k*). In a bill of exchange,

(*e*) *Brooks* v. *Elkins*, 2 M. & W. 74; *Fisher* v. *Leslie*, 1 Esp. 426; *Melanotte* v. *Teasdale*, 13 M. & W. 216.

(*f*) *Hyne* v. *Dewdney*, 21 L. J., Q. B., 278.

(*g*) Ibid.; *White* v. *North*, 3 Exch. 689 (following *Horne* v. *Redfearn*, 4 Bing. N. C. 433); *Hamilton* v. *Spottiswoode*, 4 Exch. 200; *Sibree* v. *Tripp*, 15 M. & W. 23; *Robins* v. *May*, 11 Ad. & E. 213; *Davies* v. *Wilkinson*, 10 Ad. & E. 98; *Ayrey* v. *Fearnsides*, 4 M. & W. 168; *Drury* v. *Macaulay*, 16 M. & W. 146; *Jarris* v. *Wilkins*, 7 M. & W. 410.

(*h*) *Masters* v. *Baretto*, 8 C. B. 433; *Hooper* v. *Williams*, 2 Exch. 13; *Brown* v. *De Winton*, 6 C. B. 336; *Gay* v. *Lander*, Ibid.; *Absolon* v. *Marks*, 11 Q. B. 19; *Wood* v. *Mytton*, 10 Q. B. 805.

(*i*) *Edis* v. *Bury*, 6 B. & C. 433; *Lloyd* v. *Oliver*, 21 L. J., Q. B., 307; per Lord *Denman*, C. J., *Roffey* v. *Greenwell*, 10 Ad. & E. 225. See *Allen* v. *The Sea Fire and Life Ass. Co.*, 9 C. B. 574; *Ellison* v. *Collingridge*, Id. 570; *Peto* v. *Reynolds*, 9 Exch. 410.

(*k*) Story on Prom. Notes, 2nd ed., p. 5

there are usually three original parties, the drawer, the payee, and the drawee, who, after acceptance, becomes the acceptor. In a promissory note, there are but two original parties, the maker and the payee. In a bill of exchange, the acceptor is, in contemplation of law, the primary debtor to the payee, and the drawer is but collaterally liable. In a promissory note, the maker is, in contemplation of law, the primary debtor. When a negotiable note has been indorsed by the payee, then there occurs a striking resemblance in the relations of the parties upon both instruments, although they are not in all respects identical. The indorser of a note stands in the same relation to the subsequent parties to it as the drawer of a bill; and the maker of the note is under the same liabilities as the acceptor of a bill (*l*). Hence the remarks already made respecting the rights and liabilities of parties to inland bills, may readily be applied to determine the mutual obligations of the parties to promissory notes. This latter subject will, accordingly, be here dismissed with some brief observations.

The contract of the maker of a promissory note, payable at a time certain after date, is of this kind,—he undertakes to pay the amount specified in the note at the time when it becomes due, or (as the common phrase is) at its maturity (*m*), to the payee or other person entitled to receive the

(*l*) In *Heylyn* v. *Adamson*, 2 Burr. 676, Lord *Mansfield* says, "While a promissory note continues in its original shape of a promise from one man to pay to another, it bears no similitude to a bill of exchange. When it is indorsed the resemblance begins, for then it is an order by the indorser upon the maker of the note to pay to the indorsee. This is the very definition of a bill of exchange."

See also *Gwinnell* v. *Herbert*, 5 Ad. & E. 436, 439, 440.

(*m*) The days of grace (as to which see ante, p. 451) are allowed on a promissory note, even when payable by instalments: *Oridge* v. *Sherborne*, 11 M. & W. 374. See also *Brown* v. *Harraden*, cited ante, p. 481, n. (*r*).

same, *according to the tenor of the note* (*n*). If, then, the note does not contain a condition, that it is to be presented for payment at some particular place, the maker will be liable to an action immediately the note falls due, without any demand or presentment thereof to him, because in that case his engagement is *unconditionally to pay.*

That demand or presentment is not, under ordinary circumstances, necessary as against the maker of a note, may be kept in mind by the decision of the Court of Exchequer in *Norton* v. *Ellam* (*o*), which shews, that a promissory note, even when payable *on demand,* is a present debt, and is payable *without* any demand; and accordingly the Statute of Limitations will begin to run from the date of such a note: the above case being similar to that of money lent, payable *on request,*—where no demand or request is necessary before bringing the action, because the debt which constitutes the cause of action arises instantly on the loan being made.

It must be remembered, however, that a note payable on demand, or at a date certain, differs materially (as regards the point now under notice) from one payable at or after sight; for, by the very terms of the contract, in either of these latter cases, the note must be shewn to the maker before the action can be brought (*p*).

Hardship may, no doubt, by operation of the rule of law just stated, be caused to the maker of a note, who, though willing to pay the same at maturity, cannot discover the then holder of the instrument. From the possibility of such

(*n*) Story on Prom. Notes, 2nd ed., p. 120.

(*o*) 2 M. & W. 461; *Rumball* v. *Ball*, 10 Mod. 38. See, per *Abbott*, C. J., *Macintosh* v. *Haydon*, Ry. & M. 363.

(*p*) *Dixon* v. *Nuttall*, 1 Cr. M. & R. 307; *Holmes* v. *Kerrison*, 2 Taunt. 323.

hardship being cast upon him, he may, however, relieve himself, by inserting a condition, requiring presentment at some particular place, in the note; and, if he do so, the case of *Sands* v. *Clarke* (*q*) is strong to shew the necessity of averring and proving presentment of the note before charging him, or of offering a sufficient legal excuse for its omission. There the action was by payee against maker of a promissory note, payable at a particular place. The declaration averred, that, when the note became due, the plaintiff was ready and willing to present it there, and would have done so, but the defendant was then absent from and not to be found at the said place, and had clandestinely departed and absconded from thence, without leaving any effects there or any provision for payment of the note, and that there were not any effects of the defendant there,—it was held, however, that the facts thus alleged would not, if proved, constitute any sufficient excuse for non-presentment. The judgment in *Sands* v. *Clarke* conclusively shews that presentment in the case of a note payable at a particular place may be regarded as a condition precedent to the performance of his promise to pay by the maker and that an *averment*, supported by evidence, that this condition has been duly *performed*, or has been *prevented* or *dispensed with* by the defendant, is essential to sustain the right of the payee or holder to recover upon the note. It has, in other cases, been decided that the known bankruptcy or insolvency of the maker of a note payable at a particular place will

(*q*) 8 C. B. 751, where numerous authorities upon the above subject are collected: *Van der Donckt* v. *Thellusson*, 8 C. B. 812; *Emblin* v. *Dartnell*, 12 M. & W. 830; *Spindler* v. *Grellett*, 1 Exch. 384.

In connection with the case cited in the text, it must be remembered, that the stat. 1 & 2 Geo. 4, c. 78, s. 1 (as to which see ante, p. 460) does not apply to promissory notes.

not dispense with presentment, nor will a general declaration by the maker of such a note, that he will not pay it, furnish any excuse for non-presentment (*r*): under circumstances such as are here suggested a demand at the place specified in the note, unless dispensed with, will be necessary.

The indorser of a promissory note is to be regarded as a surety merely for the party primarily liable upon the note, viz. the maker. As in the case of a bill, so in that of a note, an indorser can only be charged when presentment to the maker has been made, and due notice of dishonour has been given. Upon the subject of presentment and notice of dishonour generally, reference may be made to what has been already said upon these subjects when treating of bills of exchange (*s*). Some remarks, however, respecting the necessity for speedy presentment of negotiable paper has, with a view to convenience, been reserved for this place. The point in question is one of much practical importance, as will presently appear.

Now, in the first place, I may observe, that a bill or note payable after sight should be presented for sight within a reasonable time after it has reached the holder's hands. It is, however, in the power of the holder of a bill or note thus payable to postpone for such reasonable time the day of payment, by postponing the date of the presentment for acceptance; and, if so minded, the holder may put the bill or note, whilst unpresented, into circulation. The question whether, under all circumstances, the presentment

(*r*) *Bowes* v. *Howe*, 5 Taunt. 30; Judgm. 8 C. B. 759, 760; Argt. *Russel* v. *Langstaffe*, Dougl. 515; *Esdaile* v. *Sowerby*, 11 East, 114. See also *Bailey* v. *Porter*, 14 M. & W. 44.

(*s*) Ante, pp. 453, 471.

of such an instrument has been made within reasonable time will depend upon the particular facts of the case (*t*).

Where a bill of exchange payable on demand and accepted or where a promissory note payable on demand is circulating, it does not necessarily behove the holder of such instrument to present it for payment immediately on its reaching his hands. In the case of a bill payable on demand, or of a cheque, the rule seems to be this—that the presentment should, where the parties live in the same place, be made on the day after it came into the holder's hands (*u*). A promissory note, however, payable on demand, is often intended to be a continuing security and not, like a cheque (*x*), to be presented speedily (*y*). Hence it has been held that such a note cannot be treated as overdue (*z*), merely because it is indorsed some years after its date, no interest having been paid upon it for several years before such indorsement (*a*).

Bank note.

A *bank note* is simply a promissory note made by a banker, payable to bearer on demand (*b*). A bank note has this peculiar quality—that it circulates as money, and, in the ordinary course of business, is treated as such (*c*). In

(*t*) *Fry* v. *Hill*, 7 Taunt. 397; *Shute* v. *Robins*, 1 Moo. & M. 133; *Straker* v. *Graham*, 4 M. & W. 721.

(*u*) *Robson* v. *Bennett*, 2 Taunt. 388; *Moule* v. *Brown*, 4 Bing. N. C. 266; *Alexander* v. *Burchfield*, 7 M. & Gr. 1061.

(*x*) It will, however, be no answer to an action by the holder against the drawer of a cheque that it was not presented for payment within a reasonable time, unless in the interval the fund in the banker's hands is lost by his failure. *Robinson* v. *Hawksford*, 9 Q. B. 52.

(*y*) Per *Parke*, B., *Brooks* v. *Mitchell*, 9 M. & W. 18; *Heywood* v. *Watson*, 4 Bing. 496; *Barough* v. *White*, 4 B. & C. 325, 328.

(*z*) As to the equities which may attach against one taking a negotiable instrument when overdue, see ante, p. 471.

(*a*) *Brooks* v. *Mitchell*, supra.

(*b*) Byles on Bills, 6th ed., p. 7.

(*c*) The notes of the Bank of England constitute a legal tender, except by the Bank itself or its branches. 3 & 4 Will. 4, c. 98, s. 6.

Miller v. *Race* (*d*), Lord *Mansfield* says that *bank notes* are constantly and universally, both at home and abroad, treated *as cash*, and paid and received as cash; and it is necessary, for the purposes of commerce, that their currency should be established and secured. It was there accordingly held, that a *bonâ fide* holder of a bank note *for value* is entitled to retain it as against a former owner from whom it has been stolen; the Court applying to a bank note the rule of law applicable to money, and observing that, "in the case of money stolen, the true owner cannot recover it, after it has been paid away fairly and honestly upon a valuable and bonâ fide consideration."

Rule as to presentment of a bank note.

A bank note is expressly intended for circulation, and not meant as a continuing security in the hands of any particular holder. The rule in regard to its presentment must therefore be separately examined—it has manifestly a direct bearing on the question—Under what circumstances will the payment of a debt in bank notes be equivalent to a payment in cash? The case of *Camidge* v. *Allenby* (*e*) may be cited as a leading authority upon this subject. There the facts were as under:—Certain corn was sold and delivered by the plaintiff to the defendant at York on the Saturday morning, and paid for at three o'clock the same afternoon in notes of the bank of D. & Co., at Huddersfield. The bank in question had, in fact, stopped payment at eleven o'clock in the morning of the day named, and did not resume their payments. The insolvency of D. & Co. was, however, unknown to either of the parties to the transaction above mentioned. The plain-

(*d*) 1 Burr. 452, and 1 Smith L. C. 250.

(*e*) 6 B. & C. 373. See also *Turner* v. *Stones*, 1 D. & L 122; *Rogers* v. *Langford*, 1 Cr. & M. 637.

tiff *neither circulated the notes nor presented them for payment*, but a week after their receipt required the defendant to take back the notes and to pay him the amount of them.—The question raised accordingly was, whether, under the circumstances, the defendant was legally compellable so to do. The answer to this question was perspicuously given by Mr. Justice *Bayley*, in a judgment, from which the following passages are extracted:—"The rule," he says, "as to all negotiable instruments is, that, if they are taken in payment of a pre-existing debt, they operate as a discharge of that debt, *unless* the party who holds the instruments does all that the law requires to be done in order to obtain payment of them. Then the question is, what it was the duty of the plaintiff to do in order to obtain payment of these notes? They were intended for circulation. But I think that he was not bound *immediately* to circulate them or to send them into the bank for payment; but he was bound, within a reasonable time after he had received them, either to circulate them or to present them for payment. Now, here it is conceded, that if there had not been any insolvency of the bankers. the notes should have been circulated or presented for payment on the Monday. It is clear that the plaintiff on that day *might* have had knowledge that the bankers had stopped payment, and having that knowledge, if presentment was unnecessary, he had then another duty to perform. In consequence of the negotiable nature of the instruments, it became his duty to give notice to the party who paid him the notes, that the bankers had become insolvent, and that he the plaintiff would resort to the defendant for payment of the notes; and it would then have been for the defendant to consider whether he could transfer the loss to any

other person; for, unless he had been guilty of negligence, he might perhaps have resorted to the person who paid him the notes." Upon such grounds it was held, in *Camidge* v. *Allenby*, that the plaintiff, by reason of his laches, was not entitled to recover, but must bear the loss occasioned by the failure of the bank. The learned Judge, whose words have just been cited, remarking, that, though it might be hard that the entire loss should fall upon one individual, yet, "it is a general rule applicable to negotiable instruments, and not to be relaxed in particular instances, that the holder of such an instrument is to present promptly, or to communicate without delay notice of non-payment or of the insolvency of the acceptor of a bill or the maker of a note"(*f*); and such notice must be communicated within a reasonable time, though not necessarily before the expiration of the time allowed for presentment (*g*).

Another question, which, as connected with the preceding subject, may conveniently be discussed in this place, is this:—What right has the holder of a bank note, or of any negotiable instrument passing from hand to hand *without indorsement*, as against his immediate transferor, should the instrument transferred prove, by reason of some defect inherent in it, to be worthless? Now, it is clear, that such right, if any, will not be founded directly on the instrument itself, nor be enforceable against the defendant as virtually a party thereto. It will rather be founded on some implied undertaking upon his part, connected indeed with, but collateral to, the instrument.

A person who receives forged bank notes in payment for

(*f*) Per *Bayley*, J., 6 B. & C. 383.

(*g*) *Robson* v. *Oliver*, 10 Q. B. 704. See *James* v. *Holditch*, 8 D. & R. 40

goods sold, or who discounts a forged bill, will not in general be precluded from suing for the price of the goods, or for the amount advanced by way of discount, because, in the one case, there has been a total failure of consideration, and, in the other, the payment was made under a mistake as to facts, and likewise without consideration (*h*).

The case of *Gompertz* v. *Bartlett* (*i*) should be consulted with reference to this part of the subject, and as shewing the application of the maxim *caveat emptor* in connection with bills of exchange and promissory notes. The question there arose upon the sale of a bill of exchange, which, on the face of it, *purported to be a foreign bill*, but had in fact been drawn in London, and was unavailable for want of a stamp. This bill was discounted by the plaintiff for the defendant, who did not indorse it but bonâ fide believed the bill to have been drawn abroad. The question was, whether the plaintiff, having thus purchased a worthless commodity, was entitled to recover his purchase-money from the vendor. The Court of Queen's Bench held that he was—upon this short ground—that even in the absence of fraud a vendee is "entitled to have an article answering the description of that which he bought." The principle of this decision will be found applicable in a great variety of cases, wherever indeed forged or spurious paper passes for value from hand to hand.

Bearing upon the point now immediately before us,

(*h*) *Jones* v. *Ryde*, 5 Taunt. 488. See *Wilkinson* v. *Johnson*, 3 B. & C. 428; *Cocks* v. *Masterman*, 9 B. & C. 902.

(*i*) 2 E. & B. 849, which affirms *Jones* v. *Ryde*, 5 Taunt. 488; *Young* v. *Cole*, 3 Bing. N. C. 724. See per Lord *Kenyon*, C. J., *Fenn* v. *Harrison*, 3 T. R. 759.

A person who pays into a banker's worthless notes will, if there be no laches in the banker, have to bear the loss: *Timmis* v. *Gibbins*, 21 L. J., Q. B., 403.

(though not decided with reference to the particular class of instruments to which attention has latterly been confined), is the case of *Lamert* v. *Heath* (*k*). There the question was, whether the price of certain scrip certificates of shares in the "Kentish Coast R. Co." could be recovered back by the purchaser from the broker whom he had employed to buy them, these certificates, although known and commonly dealt with in the money-market under that designation, being in fact spurious; such being the question raised between the parties, the Court of Exchequer laid down the law applicable to it in these terms:—That, if the scrip actually purchased was the only scrip known in the market by the particular designation, the purchaser, in directing his broker to buy this scrip, and having received it, had in truth got all that he had contracted to buy, and could not therefore recover its price from his broker.

Ordinary matters of defence in actions upon bills and notes.

Having now particularised the various points, which in connection with bills of exchange and promissory notes specially demand attention, it remains to say somewhat as to matters of defence ordinarily available in actions upon such instruments. As to four only of these grounds of defence, shall I here offer some remarks, viz. *Payment*—the defence of *Fraud* and *No Consideration*—of an unauthorised *Alteration* of the instrument—of its *Loss* (*l*).

(*k*) 15 M. & W. 486. See *Westropp* v. *Solomon*, 8 C. B. 345, and cases there cited.

(*l*) For minute practical information respecting the above and other ordinary grounds of defence in actions upon bills and notes, reference must be made to standard works on pleading, and to books treating exclusively of those instruments. My principal endeavour, in briefly alluding to this subject, has been to indicate the *most recent* decisions which deserve perusal in connection with the various points here selected for examination.

Payment.

Payment of a bill must, in order that it may operate as a discharge of the acceptor or the drawer, be a payment *according to the law merchant*—that is, payment of the bill at maturity. If a party pays it before, he *purchases* it, and is in the same situation as if he had discounted the bill (*m*).

There seems, however, to be no legal reason why the indorsee of a bill may not accept satisfaction of the contingent or absolute liability of the drawer or indorser, without by so doing discharging the acceptor; unless, in the case of an accommodation bill, where the acceptor is a mere surety as between himself and the drawer, and entitled to recover against the drawer whatever he may be compelled to pay in discharge of his suretyship (*n*).

Further, it is an established rule, that if the holder of a bill sues several of the parties liable to him upon it, he has, notwithstanding payment *pendente lite*, a right to proceed in such actions to recover his costs (*o*); and, where two actions were concurrently brought upon a bill of exchange, the one against the drawer, the other against the acceptor of the bill, and the defendant in the first action obtained a Judge's order for a stay of proceedings on payment of the debt, interest, and costs, it was held, that the payment under this order could not be pleaded in bar of the further

(*m*) Per *Parke*, B., *Morley* v. *Culverwell*, 7 M. & W. 182, (citing *Burbridge* v. *Manners*, 3 Camp. 194); Judg. *Harmer* v. *Steele*, 4 Exch. 13.

(*n*) Judgm. *Jones* v. *Broadhurst*, 9 C. B. 181-2, where the cases bearing on the above point are collected; *Milnes* v. *Dawson*, 5 Exch. 948; *Jewell* v. *Parr*, 13 C. B. 909.

(*o*) *Goodwin* v. *Cremer*, 22 L. J., Q. B., 30, and cases there cited.

By the new Practice Rules of Hilary T. 1853 (reg. 24), it is provided, that, "in any action against an acceptor of a bill of exchange, or the maker of a promissory note, the defendant shall be at liberty to stay proceedings on payment of the debt and costs in that action only." Also, by the Pleading Rule of Trin T. 1853, the payment of a bill or note must be specially pleaded.

maintenance of the second action—as being a payment in satisfaction and discharge of the causes of action against the acceptor—nor be relied upon as a ground for reducing the damages (*p*).

The cases below cited (*q*) will suffice to shew what will amount to payment of a bill or note, so as to sustain a plea of payment in an action upon such instrument. Upon this part of the subject I may observe, that, if the payee of a promissory note pay the amount to an indorsee on default by the maker, the payee will not be justified in commencing an action against the maker in the name of the indorsee without authority from him (*r*). Though, if a bill payable to order of the drawer after indorsement over be dishonoured and paid by him, the drawer may return the bill to his indorsee for the purpose of his suing the acceptor upon it as trustee for the drawer (*s*), or of course he may in his own name sue upon the bill.

The *character* in which a bill is paid by a party liable on it—ex. gr., whether as indorser or as agent for the acceptor—will clearly be a question of fact (*t*).

Defence of "no consideration."

A bill or note, *primâ facie*, imports consideration; and, although the original *absence* or a total *failure* of con-

(*p*) *Randall* v. *Moon*, 12 C. B. 261. See *Belshaw* v. *Bush*, infra.

(*q*) *Hills* v. *Mesnard*, 10 Q. B. 266; *Thorne* v. *Smith*, 10 C. B. 659; *Williams* v. *James*, 2 Exch. 798 (in error); *Ralli* v. *Dennistoun*, 6 Exch. 483; *Jones* v. *Gretton*, 8 Exch. 773; *Turney* v. *Dodwell*, 23 L. J., Q. B., 137, distinguishing *Foster* v. *Dawber*, 6 Exch. 839; *Beaumont* v. *Greathead*, 2 C. B. 494.

The effect of payment of a debt by a stranger adopted by the party originally liable, is considered in *Belshaw* v. *Bush*, 11 C. B. 191, with which compare *James* v. *Isaacs*, 12 C. B. 791.

As to payment *supra protest*, see *Geralopulo* v. *Wieler*, 10 C. B. 690; per Cur., *Rotton* v. *Inglis*, 2 Q. B. 685; *Goodall* v. *Polhill*, 1 C. B. 233.

(*r*) *Coleman* v. *Bicdman*, 7 C. B. 871. See *Emmett* v. *Tottenham*, 8 Exch. 884; *Rogers* v. *Chilton*, 1 Exch. 862; *Arthur* v. *Beales*, Id. 608; *Barber* v. *Lemon*, 11 Q. B. 302.

(*s*) *Williams* v. *James*, 15 Q.B. 498.

(*t*) *Pollard* v. *Ogden*, 2 E. & B. 459.

sideration may, if properly pleaded in an action on the instrument, afford good ground of defence(*u*); yet, it is not enough in a plea of 'no consideration' merely to say, that the defendant never had any value or consideration for the bill or note, the plea must go on to aver the circumstances which shew that there was no consideration(*x*). In an action by a remote indorsee against the acceptor of a bill or maker of a note, it will be necessary in a plea of 'no consideration' to shew not merely that the defendant received no consideration, but that the plaintiff gave none for the bill or note. At all events, it must be shewn, that the plaintiff took the instrument with notice of the original want of consideration, (in which case he will be entitled to recover so much only as he himself gave for it), or that he took it with notice of facts shewing that it had been improperly obtained from the defendant, or was tainted with illegality or fraud(*y*). Further, as between the parties in question, the defence of 'no consideration' will fail, if it be shewn that any intermediate party to the bill or note gave value for it(*z*).

Although a plea of want of consideration, which omitted to set out the surrounding facts, was formerly objectionable on *special* demurrer alone(*a*), and special demurrers are abolished by the 15 & 16 Vict. c. 76, s. 51; yet, even now, if such a plea be defective on the ground just specified, a

(*u*) Byles on Bills, 6th edit. p. 98.

(*x*) Per *Jervis*, C. J., *Forman* v. *Wright*, 11 C. B. 492; *Crofts* v. *Beale*, Id. 172; *Kearns* v. *Durell*, 6 C. B. 596; *Boden* v. *Wright*, 12 C. B. 445; *Carruthers* v. *West*, 11 Q. B. 143; *Wells* v. *Hopkins*, 5 M. & W. 7.

(*y*) *Robinson* v. *Reynolds*, 2 Q. B. 196; Byles on Bills, 6th ed., pp. 97--98. See the Forms of Pleas of No Consideration, Chitt., jun., Pl., 2nd ed., pp. 275 et. seq.; *Hay* v. *Ayling*, 16 Q. B. 423.

(*z*) *Hunter* v. *Wilson*, 4 Exch. 489; *Masters* v. *Ibberson*, 8 C. B. 100.

(*a*) See *Easton* v. *Pratchett*, 1 Cr. M. & R. 798; *Mills* v. *Oddy*, 2 Id. 103, 111; *Stoughton* v. *Ld. Kilmorey*, Id. 72.

Judge at Chambers may perhaps, in pursuance of the powers confided to him by the 52nd section of the Act, order that it be struck out or amended by the party pleading it. A plea of 'no consideration' merely, is however, under the present system, believed to be of no uncommon occurrence in practice (*b*).

The rule in respect to the onus probandi on an issue taken upon a plea of 'no consideration' to an action on a bill has thus been stated by Lord *Abinger*, C. B. (*c*): "where there is no fraud, nor any suspicion of fraud, but the simple fact is that the defendant received no consideration for his acceptance, the plaintiff is not called upon to prove that he gave value for the bill;" but if the bill be connected with some fraud, and a suspicion of fraud be raised from its being shewn that something has been done with it of an illegal nature—as that it has been clandestinely taken away, or has been lost or stolen,—the holder will be required to shew that he gave value for it (*d*). If, indeed, in an action by indorsee against acceptor of a bill, the ground of defence be, that the bill was obtained illegally from the defendant, and indorsed to the plaintiff without consideration, the defendant will be bound in his plea to aver both the illegality and want of consideration; and if at the trial he proves the illegality, such proof will, according to the rule above stated, throw upon the plaintiff the onus of shewing that he gave consideration for the bill. The reason of this rule is explained by *Parke*, B., in *Bailey* v. *Bidwell* (*e*), who says, that, if the instru-

(*b*) The remarks in the preceding page are meant to be understood as applicable to the *former* practice: in reference to which, see also *Trinder* v. *Smedley*, 3 Ad. & E. 522; *Graham* v. *Pitman*, 3 Ad. & E. 521.

(*c*) *Mills* v. *Barber*, 1 M. & W. 425, 432.

(*d*) Judgm., 1 M. & W. 432.

(*e*) 13 M. & W. 76; *Smith* v. *Braine*, 16 Q. B. 244.

ment in question were proved to have been obtained by fraud or affected by illegality, that affords a presumption that the person guilty of the illegality would dispose of the bill or note, and would place it in the hands of another person to sue upon it; and such proof casts upon the plaintiff the burden of shewing that he was a bonâ fide indorsee for value (*e*).

The defence of 'no consideration' will be pleadable as to part only of the amount of a bill or note; for instance, by way of answer to an action upon such instrument, "a man might say, that, in adding up an account, he erroneously supposed himself to be indebted in '100*l.*, whereas in truth 10*l.* only was due.' That, in the case of a bill or note, would be a good plea of want of consideration except as to 10*l.*"(*f*). A partial failure of consideration could not, however, be pleaded as a defence to the *whole* bill or note (*g*); nor would it be pleadable as a defence *pro tanto*, unless the failure of consideration were in respect of a specific ascertained amount (*h*).

We have already (*i*) seen, that, if a person lends his name to another for his accommodation, the party accommodated undertakes to pay the bill at maturity, and further, to indemnify the person accommodating him, in case that person is compelled to pay the bill for him. Hence there is "an implied authority to such person to pay it, if he be in

(*e*) See also, in support of the doctrine here stated, *Harvey* v. *Towers*, 6 Exch. 656; *Berry* v. *Alderman*, 14 C. B. 95; *S. C.*, 13 Id. 674; *Smith* v. *Braine*, 16 Q. B. 244, 251; *Mills* v. *Barber*, 1 M. & W. 425; *Edmunds* v. *Groves*, 2 M. & W. 642; *May* v. *Seyler*, 2 Exch. 563, 566.

(*f*) Per *Jervis*, C. J., *Forman* v. *Wright*, 11 C. B. 492.

(*g*) *Clark* v. *Lazarus*, 2 M. & Gr. 167; *Camac* v. *Warriner*, 1 C. B. 356; *Darnell* v. *Williams*, 2 Stark. 166; and see further, as to the mode of pleading in case of a partial failure of consideration, Chitt. Jun. Pl., 2nd ed., p. 281, n. (*v*).

(*h*) Byles on Bills, 6th ed. p. 99.

(*i*) Ante, p. 449, and cases cited, Id., n. (*k*).

that situation that he may be compelled by law to pay the bill, though the holder do not actually compel him to do so; and, after payment, he may sue the party accommodated for money paid on his account; for such payment is in truth under the implied authority given by the contract of accommodation between the parties; and whether this be a payment of the whole bill, or of only a part of it, makes no difference" (*j*).

Material alteration of bill or note —its effect.

From the important case of *Master* v. *Miller* (*k*) is deduced the proposition, that any unauthorised and material *alteration* of a bill of exchange or promissory note will, unless satisfactorily accounted for, *avoid the instrument*, whether such alteration be made by the holder himself or by a stranger; for "no man shall be permitted to take the chance of committing a fraud without running any risk of losing by the event when it is detected" (*l*). And "*a party who has the custody of an instrument made for his benefit is bound to preserve it in its original state*" (*m*). If he omits to do so, and thus loses his remedy, he has no right to complain, since an alteration cannot be made in the instrument except through fraud or laches on his part (*n*).

The principle just stated and explained was in *Pigot's case* (*o*) first propounded in regard to deeds (*p*), and has since been extended to all instruments comprehending

(*j*) Judgm., *Sleigh* v. *Sleigh*, 5 Exch. 517.

By the New Pleading Rules (reg. 8), it is provided, that the "drawing, indorsing, accepting &c. bills or notes by way of accommodation," must be specially pleaded.

(*k*) 4 T. R. 320; *S. C.* (in error), 2 H. Bla. 140; 1 Smith L. C. 458.

(*l*) Per Lord *Kenyon*, C. J., *Master* v. *Miller*, supra.

(*m*) Judgm., *Davidson* v. *Cooper*, 13 M. & W. 352.

(*n*) Id., ibid.

(*o*) 11 Rep. 26 b; *Whelpdale's case*, 5 Id. 119 a.

(*p*) See also *The Agricultural Cattle Insur. Co.* v. *Fitzgerald*, 16 Q. B.

words of contract (*q*). Thus, in *Davidson* v. *Cooper* (*r*), which may be regarded as a leading authority upon the subject before us, the question arose with reference to a guarantie (not under seal) which had been given by the defendants to a banking company, and which, whilst in the plaintiffs' possession, but without their knowledge or consent, had been altered, by the affixing of seals near to the signatures of the defendants; in consequence whereof the instrument purported to be a specialty instead of a simple contract. In this case judgment was finally given for the defendants, on the express ground that the adding of the seals constituted a material alteration, inasmuch as it gave in fact a *different legal character* to the writing to which they were attached, and would, if made with the consent of all interested, have completely changed as well the nature of the relation towards each other of the parties to it as the remedies upon it (*s*).

The principle now under notice is strictly applied to all negotiable instruments. In *Warrington* v. *Early* (*t*), the action was brought upon a promissory note, which had been made payable five months after date, with lawful interest. It appeared, however, that in the corner of this note had been written, at the plaintiff's request, and unknown to the defendant, the following words:—"Interest to be paid at 6*l*. per cent. per annum." The alteration thus made was held to be material, and to vitiate the note. So, if after a bill of

432; *Doe* d. *Tatum* v. *Catomore*, Id. 745 (with which compare *Doe* d. *Shallcross* v. *Palmer*, Id. 747); per Lord *Denman*, C. J., *Harden* v. *Clifton*, 1 Q. B. 524.

(*q*) Per *Williams*, J., 5 C. B. 194; per *Ashhurst*, J., *Master* v. *Miller*, 4 T. R. 331.

(*r*) 11 M. & W. 778; *S. C.*, 13 M. & W. 343.

(*s*) As to what may constitute a 'material alteration,' within the rule illustrated in the text, see also per *Maule*, J., *Mollett* v. *Wackerbarth*, 5 C. B. 193.

(*t*) 2 E. & B 763.

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exchange, accepted generally, has been put in circulation, it be altered without the consent or knowledge of the acceptor, by adding to the acceptance words making the bill payable at a particular place, this alteration will vitiate the bill and discharge the acceptor from liability upon it, even as against a bonâ fide holder of the bill for value, without notice of the alteration; for, although "the negotiability of bills of exchange is to be favoured," yet, "with this view, it is material that their purity should be preserved" (*u*). The case of *Master* v. *Miller* (*x*), already cited, establishes that an unauthorised alteration of a bill, after acceptance, whereby its payment would be accelerated, avoids the instrument. And should an authority be wanted to shew that the maker of a promissory note would be bound by an alteration therein, *although material, provided* he had *assented* to it or recognised it, reference may be made to the case of *Tarleton* v. *Shingler* (*y*), which goes to the precise point just specified.

Loss of bill or note

Where a bill of exchange has been *lost* before falling due and not afterwards recovered, the question arises—can a remedy upon the instrument be enforced? and the answer to this question must depend upon the nature of the bill, and the form in which the defence is presented. If the bill be originally negotiable, *i.e.* payable to "order" or "bearer," the cases below cited (*z*) serve to shew that the acceptor is

(*u*) *Burchfield* v. *Morris*, 3 E. & B. 683. See also the cases cited Leg. Max., 2nd ed., p. 116, *in notis*.

(*x*) 1 Smith L. C. 458, where the authorities are collected; of which see particularly *Alderson* v. *Langdale*, 3 B. & Ad. 660 (where, in an action by indorsee against drawer of a bill given in payment for goods sold, a material alteration of the bill by the vendor was held to operate as a satisfaction of the original debt). With the preceding case may be compared *Atkinson* v. *Hawdon*, 2 Ad. & E. 628.

(*y*) 7 C. B. 812.

(*z*) *Hansard* v. *Robinson*, 7 B. & C. 90; *Ramuz* v. *Crowe*, 1 Exch. 167, where the law laid down in *Hansard* v. *Robinson* was extended to the

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not bound to pay the bill to any one suing as holder, who shall refuse or be unable to deliver up the bill—the reason assigned being, that 'by the custom of merchants, the holder of a bill should present the instrument at maturity to the acceptor, demand payment of its amount, and, upon receipt of the money, *deliver up* the bill'—the acceptor upon paying the bill having *a right to its possession* "for his own security, and as his voucher and discharge *pro tanto*" (*a*) in the account between himself and the party who drew upon him—a right which remains to him equally where the payment is made under the compulsory process of law.

In *Crowe* v. *Clay* (*b*) the loss of a negotiable bill given on account of a debt, was held to be an answer to an action for the debt as well as to one on the bill. There the action was for *goods sold and delivered;* and, as to a part of the demand, the defendant pleaded, that, before action, the plaintiff drew on the defendant a bill of exchange for that particular amount, payable to the plaintiff's order at a certain time after date, which the defendant accepted and delivered to the plaintiff for and on account of the said sum. The plea then averred, that the plaintiff afterwards *lost* the bill out of his possession, and that "from thence hitherto" it remained so lost. The question for determination was, whether this plea afforded matter of defence to the action; and in discussing its validity the Court observed:—A bill given for and on account of money due on simple contract operates as a conditional payment, which may be defeated at

case of a bill payable to the drawer's order, though not indorsed at the time of loss.

As to recovering interest upon a bill without producing it, see *Hutton* v. *Ward*, 15 Q. B. 26.

As to giving secondary evidence of a lost bill, see *Blackie* v. *Pidding*, 6 C. B. 196.

(*a*) Judgm., 7 B. & C. 94.

(*b*) 9 Exch. 604, *S. C.*, 8 Id. 295.

the option of the creditor if the bill is unpaid at maturity in his hands, in which case he may rescind the transaction of payment, and sue on the original demand (*c*). Should the bill be *lost*, however, the condition on which the payment may be defeated does not arise (*d*), and the defendant, if compelled to pay the original debt, would be subject to inconvenience of like kind as if compelled to pay the bill (*e*). Further, it is observable, that, to entitle the plaintiff to sue on a bill, he ought to be the holder of the bill (*f*), and the bill ought to be due; and should his title to sue be defective in either of these respects, the defendant may avail himself of the defect. Of course, if the bill is not due, that would *per se* be a good ground of defence to the action; but it is quite competent to a defendant, without taking that particular objection, to plead merely that the bill has been lost; for it may well be that a person who has given a bill on account of a debt may be able and willing to pay the debt if he can withdraw his bill from circulation, and may object to pay only on the ground that the bill is not forthcoming, without objecting to its not being due (*g*).

The rule above stated does not seem to hold in case of the loss of a *non-negotiable* bill or note (*h*); the reason of the rule being then inapplicable. And it is material to re- 17 & 18 Vict. c. 125, s. 87.

(*c*) See *Griffiths* v. *Owen*, 13 M. & W. 58, 64; *James* v. *Williams*, Id. 828.

(*d*) See *Bolshaw* v. *Bush*, 11 C. B. 191, 201.

(*e*) See *Woodford* v. *Whiteley*, Moo. & M. 517; *Mercer* v. *Cheese*, 4 M. & Gr. 804; *Price* v. *Price*, 16 M. & W. 232.

(*f*) See *Emmett* v. *Tottenham*, 8 Exch. 884.

(*g*) See also *Bartlett* v. *Holmes*, 13 C. B. 630, 638, which shews, that, where a person has undertaken to pay money or to deliver goods pursuant to a written order, upon its being duly indorsed and presented to him, he is entitled to the possession of the document before he can be called upon to part with the money or the goods.

(*h*) Per *Jervis*, C. J., *Charnley* v. *Grundy*, 14 C. B. 608, 614; *Wain* v. *Bailey*, 10 Ad. & E. 616.

member, that, by the stat. 17 & 18 Vict. c. 125, s. 87, it is now provided, that, in "any action founded upon a bill of exchange or other negotiable instrument, it shall be lawful for the Court or a Judge to order that the loss of such instrument shall not be set up, provided an indemnity is given, to the satisfaction of the Court or Judge or a Master, against the claims of any other person upon such negotiable instrument"(*i*).

It will not, of course, be supposed, that the grounds of defence in actions upon bills and notes above commented on alone deserve attention; other noticeable matters, as illegality, fraud, or duress, are in such actions pleadable in bar. In regard to the two former of these matters, the reader is referred to the general remarks bearing upon them contained in the 1st chapter of this Book (*j*). In regard to the last-named ground of defence, the cases below cited may be consulted (*k*).

Dismissing the subject of bills of exchange and promissory notes, which, when worded in the form usual amongst merchants, are in the true sense of the word 'negotiable,' a few remarks may be applied to some other kinds of instruments, which, if left unnoticed, might perhaps be deemed, by a misconception of their precise nature, to possess the quality of negotiability.

(*i*) See the remarks upon the above section in Mr. Philips' edit. of the Act, pp. 57–8. As to relief in equity, in case of loss of a bill or note, see *Cook* v. *Darwin*, 23 L. J. Ch. 997, 8.

(*j*) Ante, pp. 341, 357.

As to illegality of consideration for a bill or note, see further, Byles on Bills, 6th ed. Chap. X.; *Masters* v. *Ibberson*, 8 C. B. 100.

As to the defence of intoxication, see *Gore* v. *Gibson*, 13 M. & W. 623; *Nagle* v. *Baylor*, 3 Dr. & W. 60.

(*k*) *Kearns* v. *Durell*, 6 C. B. 596, (duress of goods); *Duncan* v. *Scott*, 1 Camp. N. P. C. 100; *Cumming* v. *Ince*, 11 Q. B. 112; *Stevens* v. *Underwood*, 4 Bing. N. C. 655, (duress of person). See *Smith* v. *Monteith*, 13 M. & W. 427.

Bill of lading—what.

A 'bill of lading' is a written acknowledgment of the master of a vessel that he has received goods from the shipper, to be conveyed on the terms therein expressed to their destination, and to be then delivered to the parties therein designated (*l*). The ordinary practice is this: when goods are sent on board ship, the master or person acting for him gives a receipt for them, and the master afterwards signs three parts of a bill of lading; one of which is retained by the captain, another is transmitted to the consignee, and a third is held by the consignor himself, for his own security (*m*).

The bill of lading specifies that the goods sent are to be delivered to the consignee or his assigns or order, or to the order or assigns of the consignor, or to order or assigns merely; and, according to the form of the instrument, it usually passes either by *delivery* or by *indorsement and delivery* (*n*); so that thus far there is a strong resemblance observable between a bill of lading and a promissory note or bill of exchange (*o*). When, however, we proceed to inquire, whether the contract itself evidenced by the bill of lading is transferred by the indorsement of that instrument, we are struck with a very important distinction which exists be-

(*l*) Abbott on Shipp., 8th ed., p. 323.

When the captain has signed bills of lading for a cargo actually on board his vessel, his power is exhausted, and he cannot, by signing other bills of lading for goods which are not on board, charge his owner: *Hubbersty* v. *Ward*, 8 Exch. 330. See also *Grant* v. *Norway*, 10 C. B. 665.

(*m*) Per *Buller*, J., *Lickbarrow* v. *Mason*, 2 T. R. 72; *S. C.*, 1 H. Bla. 357, 6 East, 21, n., and 1 Smith L. C. 388. But the practice stated in the text is not uniformly observed.

(*n*) Abbott on Shipp., 8th ed., pp. 528-9; Maude & P. Merch. Shipp. p. 142, (where the usual form of a bill of lading may be seen). Atkinson Shipp. L., p. 245.

(*o*) Hence a bill of lading is sometimes spoken of as 'negotiable.' See, per *Tindal*, C. J., *Jenkyns* v. *Usborne*, 7 M. & Gr. 699.

tween the two kinds of security just named. For, whereas a promissory note, if originally negotiable, creates a continuing contract, upon which an action is sustainable at suit of any indorsee and holder, a bill of lading transfers merely the property in the goods to which it relates, but vests no right of action upon the instrument itself in the assignee (*p*). True it is, that this latter party (holding the bill of lading) might sue in trover for the goods, relying upon his documentary title to support the action (*q*). But trover is founded not upon contract, but upon property and the right to possession of chattels; it offers, therefore, no similarity to an action ex contractu, directly founded upon a negotiable instrument (*r*).

A bill of lading, even if indorsed in blank, is not (like a bill of exchange or promissory note made payable to bearer,) a negotiable instrument passing by mere delivery to a bonâ fide transferee for value, without regard to the title of the party who transfers it. Although the shipper of goods may have indorsed in blank a bill of lading de-

(*p*) *Thompson* v. *Dominy*, 14 M. & W. 403; *Howard* v. *Shepherd*, 9 C. B. 297; *Sanders* v. *Vanzeller*, 4 Q. B. 260, (recognised in *Zwilchenbart* v. *Henderson*, 9 Exch. 728, and in *Kemp* v. *Clark*, 12 Q. B. 653); *Evans* v. *Marlett*, 1 Ld. Raym. 271; Judgm. *Tindall* v. *Taylor*, 24 L. J., Q. B., 12, 17.

(*q*) *Lickbarrow* v. *Mason*, supra.

Ever since the great case of *Lickbarrow* v. *Mason*, supra, the law has been considered to be, that the bonâ fide transferee for value of a bill of lading, indorsed by the shipper or his consignee, and put into circulation by the authority of the shipper or consignee, has an absolute title to the goods, freed from the equitable right of the unpaid vendor to stop in transitu as against the purchaser: Judgm., 3 E. & B. 637.

(*r*) *Wilmshurst* v. *Bowker*, 7 M. & Gr. 882; *Turner* v. *Trustees of Liverpool Docks*, 6 Exch. 543; and *Key* v. *Cotesworth*, 7 Exch. 595—are important decisions with reference to the effect of the indorsement of a bill of lading upon the title to and jus disponendi over goods.

See also *Pennell* v. *Alexander*, 3 E. & B. 283; *Wait* v. *Baker*, 2 Exch. 1; *Van Casteel* v. *Booker*, Id. 691.

liverable to his assigns, his right is not affected by an unauthorised appropriation of it. If it be stolen from him, or transferred without his authority, a subsequent bonâ fide transferee for value cannot make title under it as against the shipper (*s*). The bill of lading only represents the goods; and the transfer of the symbol does not, in the case here put, operate more than a transfer of what is represented (*s*).

Railway scrip.

It might perhaps, at first sight, be supposed, that a scrip certificate (*t*) of a projected railway company, which undoubtedly passes from hand to hand on the Stock Exchange, offers an instance (quite unexceptionable) of the assignment of a *chose in action;* but, on examination, we shall find that this is not so, and that the purchase of scrip is, in truth, the purchase of a right to stand in the place of the original allottee, quoad his interest in the concern (*u*). So that an action for recovery of the deposit money originally paid must be brought in the name of the allottee—not in that of the purchaser of the scrip. Even when a company has been completely constituted

(*s*) Judgm., per Lord *Campbell*, C. J., *Gurney* v. *Behrend*, 3 E. & B. 633-4.

In *Lickbarrow* v. *Mason*, supra, Lord *Loughborough* observes, that "As the indorsement of a bill of lading is an assignment of the goods themselves, it differs essentially from the indorsement of a bill of exchange, which is the assignment of a debt due to the payee, and which, by the custom of trade, passes the whole interest in the debt."

(*t*) A *share* is a certain amount of interest in a particular company. A *scrip certificate*, which is issued to an allottee or subscriber at the time of paying his deposit and giving up his letter of allotment, is evidence merely of the right to obtain shares: Wordsw. Jt. St. Comps., 6th ed., p. 99. See *The Waterford &c. R. C.* v. *Pidcock*, 8 Exch. 279, 283-4; *Jackson* v. *Cocker*, 4 Beav. 59.

(*u*) See *Gerhard* v. *Bates*, 2 E. & B. 476; *Jackson* v. *Cocker*, supra; per *Maule*, J., *Tempest* v. *Kilner*, 2 C. B. 308.

under the Registration Act, or by virtue of some special enactment, and when its shares are legally saleable in the market, those persons only will be entitled to be considered as "shareholders" who have complied with the statutory requirements applicable on a transfer of shares (*x*).

(*x*) *Wilkinson* v. *The Anglo-Californian Gold Mining Co.* 21 L. J., Q. B., 327.

Various kinds of instruments, more or less perfectly negotiable, other than those mentioned in the text, are specified in the note to *Miller* v. *Race*, 1 Smith L. C. 258.

CHAPTER IV.

EVIDENCE OF CUSTOM OR USAGE TO EXPLAIN WRITTEN CONTRACTS.

HAVING in the previous chapters of this Book spoken of various kinds of written contracts,—of deeds,—of contracts required to be in writing by the Statute of Frauds and other enactments—of negotiable instruments—it may now be proper to inquire respecting rules of interpretation and evidence applicable to such documents, so far, at all events, as those rules may be of practical importance in connection with ordinary mercantile transactions. An acquaintance merely with the forms and properties of particular instruments—with the principles which determine their validity,—would avail little to the practitioner if unaccompanied by a knowledge of the elementary rules of evidence and of construction.

Of rules applicable for determining the meaning and intention of the parties to a written contract, a division into two classes may be made: whereof the first will include those maxims to which the *grammarian* or *logician* would naturally have recourse, in order to explain an inverted sentence or a complicated phrase; and the second will comprise such principles of construction as fall more peculiarly within the lawyer's cognisance, whereby is regulated the admissibility of extrinsic evidence to explain language which either is in itself ambiguous, or, when applied to extrinsic facts, becomes obscure and doubtful.

As falling under the former of the two classes of rules

just mentioned (to which, as presenting no especial difficulty, a brief allusion must suffice), the following well-known principles of construction may be specified—that the true meaning of a word may often best be ascertained by looking at the accompanying words, or *noscitur a sociis*—that the express mention or specification of one thing must usually be understood as implying the exclusion of some other thing ejusdem generis not specified, *expressio unius exclusio alterius*—that words referred to should usually be read as if incorporated with the clause which makes reference to them, *verba relata inesse videntur*—that the relative must in general be taken as referring to the next antecedent, *ad proximum antecedens fiat relatio*, unless some other construction is, with a view to the meaning of the instrument, obviously needed. To the foregoing, other analogous rules of construction—in their form of expression equally trite, and in their signification equally free from difficulty—might be added.

Now, it is obvious that the rules just enumerated are precisely those which an educated person would (without possessing legal knowledge) bring to bear upon the construction of any document submitted to his consideration. They are, indeed, rules of grammar rather than of law, and may accordingly be dismissed without any further observation (*a*).

With regard to the second of the two classes of rules above specified, we must remember (*b*), that, in certain cases considerations of public policy and convenience require that unwritten contracts shall not be received in evidence;

(*a*) As to the rules above enumerated, and others akin to them, see Leg. Max., 2nd ed., chap. viii.

(*b*) Per Lord *Denman*, C. J., *Trueman* v. *Loder*, 11 Ad. & E. 598.

that where the parties themselves have agreed to reduce into writing their agreements, common sense has established the plain and intelligible rule, that the writing must bind, and that no spoken words can be allowed to relax or vary its obligation (*c*). These well known propositions are not, however, to be received without qualification or exception. Sometimes the language of a contract is ambiguous. Sometimes a word or phrase occurring in it is of doubtful significance, or *primâ facie* insensible. What mode of interpretation is *then* to be adopted with a view to carrying out, if possible, the intentions of the contracting parties? In attempting to answer this question, let us first advert to the rule of Lord Bacon, who tells us (*d*) that "there be two sorts of ambiguities of words: the one is *ambiguitas patens*, and the other *latens*. *Patens* is that which appears to be ambiguous upon the deed or instrument; *latens* is that which seemeth certain and without ambiguity for anything that appeareth upon the deed or instrument, but there is some collateral matter out of the deed that breedeth the ambiguity."

A simple instance of *ambiguitas patens* presents itself where a blank occurs in some material part of a written contract (*e*). "A *latent ambiguity*," says *Alderson*, B. (*f*), "is where you shew that words apply equally to two different things or subject matters; and then evidence is admissible to shew which of them was the thing or subject matter intended." The word 'ambiguous' is (it may further be remarked,) sometimes, not quite correctly, used in refer-

(*c*) See preceding note (*b*).

(*d*) Max. reg. 23.

(*e*) Wigr. Extr. Evid., 3rd ed., p. 88. See also *Saunderson* v. *Piper*, 5 Bing. N. C. 425; *Clayton* v. *Lord Nugent*, 13 M. & W. 200.

(*f*) *Smith* v. *Jeffryes*, 15 M. & W. 561.

ence to that which is comprehensive or general. Properly speaking, however, an expression is 'ambiguous' only when, from its very terms, it may mean either one thing or another;—the use of a *nomen generale* under which several different things may be included, does not necessarily create an ambiguity in the instrument containing it (*g*).

Now, the short rule to be kept in mind, with reference to the above two kinds of ambiguity, is, that, whereas extrinsic evidence is admissible to explain a latent, it cannot ordinarily be received to clear up a patent ambiguity. The application of this rule is, however, by no means free from difficulty, and can only be apprehended by a careful study and comparison of decided cases.

In general, no doubt, an ambiguity appearing within the four corners of an instrument must, as Lord Bacon observes (*h*), be removed, if at all, by *construction* (*i. e.* by a careful comparison of other portions of the instrument with that particular part in which the ambiguity arises), or by *election* (of which an example sometimes presents itself in the case of a grant or gift—the grantee or donee rendering, by his election of one specific thing out of several to which the words used might equally apply, that certain which was before uncertain); but never by *averment* or *evidence of extrinsic facts* (*i*).

It would, nevertheless, be quite erroneous to suppose that extrinsic evidence is under no circumstances admissible to clear up a *primâ facie patent ambiguity* in a written contract, for proof of facts may be given with a view to shewing that *the apparent uncertainty does not in truth ex-*

(*g*) See per *Pollock*, C. B., *Ashworth* v. *Mounsey*, 9 Exch. 186-7.

(*h*) Max. reg. 23.

(*i*) Id., ibid.

ist; for instance, if a thing be designated on the face of an instrument in terms imperfect and equivocal, admitting either of no meaning at all when taken per se, or of a variety of different meanings, and referring tacitly or expressly for the ascertainment and completion of their meaning to extrinsic facts, it will be no objection to the reception of evidence of those facts, that the ambiguity in question is manifested, and arises directly on the face of the instrument (*j*).

Evidence to identify subject-matter of contract—

Speaking philosophically, indeed, we must *always* look beyond the instrument itself, in order to ascertain its meaning (*k*); thus, if the word Blackacre be used in a lease, there must be evidence to shew that the particular field is Blackacre (*l*). Now, here the instrument appears on the face of it to be perfectly intelligible and free from doubt, and yet extrinsic evidence *must* be received, for the purpose of shewing what the instrument refers to, or, in other words, with a view to identifying the thing or matter spoken of. In such cases, Courts of law recognise that natural dependence which exists between language and the circumstances with reference to which it is used, and which makes a knowledge of such circumstances necessary to a right interpretation of the language (*m*).

A few cases, illustrating what has been just said, in reference to ordinary trading contracts, may be useful:—

or parties to it

Where A. and B. trade under the firm of A., the name A., when used in a contract relating to the particular trade, means A. and B.; and to shew that it has such

(*j*) See, per Sir *Thomas Plumer*, M. R., *Colpoys* v. *Colpoys*, 1 Jac. 463--4.

(*k*) Per *Rolfe*, B., *Cayton* v. *Lord Nugent*, 13 M. & W. 207.

(*l*) Per *Coleridge*, J., *Doe* d. *Preedy* v. *Holtom*, 4 Ad. & E. 82.

(*m*) Wigr. Extr. Evid., 3rd ed., p. 83.

meaning, and with a view to charging B., parol evidence will be admissible (*n*).

Let us next suppose, that a written contract for the sale of goods is signed by C. Evidence will then be admissible to shew that, in so signing it, he acted as agent for D., provided the object of such evidence be to charge D., and not to discharge C. This point was decided in *Higgins* v. *Senior* (*o*), the Court observing, "There is no doubt that, where such an agreement is made, it is competent to shew that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals; and this, whether the agreement be or be not required to be in writing by the Statute of Frauds, and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but shews that it also binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal. But, on the other hand, to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party is not such, would be to allow parol evidence to contradict the written agreement; which cannot be done" (*p*).

Again, parol evidence may often be necessary in an action ex contractu, to shew that the party sued is the person who made the contract declared upon, and who is bound by it. So whether a person contracts in his own name

(*n*) 2 Smith L. C. 225-6. Post, Chap. 5, Sect. 1.

(*o*) 8 M. & W. 834.

(*p*) Judgm., 8 M. & W. 844; *Beckham* v. *Drake*, 9 M. & W. 39; *H. C.*, 11 Id. 315; 2 H. L. Cas. 579.

or in that of another, or in a feigned name, and whether the contract be signed by his own hand or by that of an agent, are inquiries not different in their nature from the question—who is the person who has just ordered goods in a shop? If he is sued for the price, and his identity is made out, the contract is not varied by appearing to have been made by him in a name not his own (*q*).

The instances above given shew that, in the most ordinary transactions, evidence dehors a written contract may be required, and will be admissible, to inform the Court or jury (as to whose respective functions in such cases some remarks will presently be offered), in regard to its true meaning and effect.

Mercantile terms—how explicable.

To advance a step further in the inquiry before us, let us next suppose that terms are used in a written contract or mercantile instrument, which, although not familiar to the public, are known and understood by a particular class of persons in a certain special and peculiar sense; evidence to that effect will be admissible, for the purpose of applying the instrument to its proper subject-matter; and the case will be the same as if the parties in framing their contract had made use of a foreign language, which the Courts are not bound to understand. An instrument so worded is not on that account void; it is certain and definite for all legal purposes, because it can be made so in evidence through the medium of an interpreter. Conformably with these principles, the Courts have long allowed mercantile instruments to be expounded according to the custom of merchants, who have a style and lan-

(*q*) Judgm., *Trueman* v. *Loder*, 11 Ad. & E. 594-5; Per *Maule*, J., *Lindus* v. *Bradwell*, 5 C. B. 591.

guage peculiar to themselves, of which usage and custom are the legitimate interpreters (*r*).

Besides the case where an expression occurring in a contract is wholly unintelligible, save to persons conversant with the trade to which it relates, a term may chance to be used therein which, in addition to its popular and ordinary meaning, bears also a technical signification. A doubt will thereupon at once arise:—In which of its two senses, the ordinary or the technical, is the word or phrase in question to be understood? This point will have to be determined by the weight of evidence in favour of either view which may be adduced; subject, however, to the preliminary decision of the Court on inspection of the particular contract as to the admissibility of *any* extrinsic evidence, such as tendered, to explain it. When the meaning of the technical expression has thus been ascertained, the true construction of the contract will be for the Judge, not for the jury, to determine (*s*).

An examination of the case of *Simpson* v. *Margitson* (*t*) may assist towards a right apprehension of this rule. There the plaintiff, an auctioneer, claimed, under a written contract, certain commission upon the sale of an estate, "if sold by auction or within two *months* after." A sale of the estate was effected within two *calendar* months, though not within two *lunar* months, after the auction, and the Court held, that, although evidence would have been admissible to shew that, according to the usage of

(*r*) Stark. Evid., 4th ed., p. 701, cited in *Smith* v. *Wilson*, 3 B. & Ad. 728, 733; post, p. 518.

(*s*) Per *Parke*, B., *Hutchison* v. *Bowker*, 5 M. & W. 542.

In regard to the propositions above laid down, see also *Van Baggen* v. *Baines*, 9 Exch. 523; *Couturier* v. *Hastie*, Id. 102, *S. C.* 8 Exch. 40.

(*t*) 11 Q. B. 23.

auctioneers, 'a month' signifies a *calendar* month, yet, in the absence of such evidence, the legal meaning of the word in question should be allowed to prevail. "It is clear," remarked Lord *Denman*, C. J., "that 'months' denote at law 'lunar' months, unless there is admissible evidence of an intention in the parties using the word to denote 'calendar' months. If the context shews that calendar months were intended, the Judge may adopt that construction (*u*). If the surrounding circumstances at the time the instrument was made shew that the parties intended to use the word not in its primary or strict sense, but in some secondary meaning, the Judge may construe it from such circumstances, according to the intention of the parties (*x*). If there is evidence that the word was used in a sense peculiar to a trade, business, or place, the jury must say whether the parties used it in that peculiar sense (*y*). If the meaning of a word depends upon the usage of the place where anything under the instrument is to be done, evidence of such usage must be left to the

(*u*) *Lang* v. *Gale*, 1 M. & Sel. 111; *Reg.* v. *Chawton*, 1 Q. B. 247.

(*x*) *Goldsheede* v. *Swan*, 1 Exch. 154, and cases cited ante, pp. 393, 394; *Walker* v. *Hunter*, 2 C. B. 324; Bac. Max. reg. 10; *Mallan* v. *May*, 13 M. & W. 510; *Beckford* v. *Crutwell*, 1 Moo. & R. 187.

Where a contract is evidenced partly by writing, partly by proof of the behaviour and conduct of parties, the question as to what the contract was, will be for the jury: *Moore* v. *Garwood*, 4 Exch. 681; per Lord *Campbell*, C. J., *Foster* v. *The Mentor Life Ass. Co.*, 3 E. & B 79.

(*y*) *Smith* v. *Wilson*, 3 B. & Ad. 728, where evidence was held admissible, to shew, that, by the custom of the country in which a lease was made, the words "one thousand," when applied to rabbits, signified "twelve hundred." This case shows, that the principle which regulates the admissibility of evidence to explain mercantile instruments, is not confined to *them*, but applies also to other kinds of contracts, those, for instance, between landlord and tenant.

See *Grant* v. *Maddox*, 15 M. & W. 737; *Jolly* v. *Young*, 1 Esp. 186; *Spicer* v. *Cooper*, 1 Q. B. 424.

jury" (*y*). The learned Judge further observed, that, if technical words are used, the jury may have to assign their meaning.

In accordance with the rules above laid down, *Tindal*, C. J., remarks, in *Shore* v. *Wilson* (*z*), that where any doubt arises as to the true sense and meaning of words used in a written instrument, or any difficulty presents itself as to their application under the surrounding circumstances, the sense and meaning of the language used may be investigated and ascertained by evidence dehors the instrument itself. Such investigation does of necessity take place in the interpretation of instruments written in a foreign language (*a*)—in the case of ancient instruments (*b*), where, by lapse of time and change of manners, their words have acquired in the present age a different meaning from that which they originally bore—in cases where terms of art or science occur—in mercantile contracts, which in many instances use a peculiar language, intelligible to those only who are conversant with trade and commerce—and in other cases in which the words, besides their general common meaning, have acquired by custom or otherwise a well-known peculiar idiomatic meaning in the particular country in which the party using them was dwelling, or in the particular society of which he formed a member,

(*y*) Citing *Robertson* v. *Jackson*, 2 C. B. 412; *Bourne* v. *Gatliff*, 11 Cl. & F. 45.

(*z*) 5 Scott N. R. 1038. See also the observations of *Parke*, B., *Clift* v. *Schwabe*, 3 C. B. 469.

(*a*) Ante, p. 515; post, p. 525.

(*b*) Ancient grants and charters, when ambiguous, may be explained by evidence of modern usage: *Calmady* v. *Rowe*, 6 C. B. 861, 893, n. (*a*); *Reg.* v. *Powell*, 8 E. & B. 377; *Duke of Beaufort* v. *Mayor of Swansea*, 3 Exch. 413, 425; *Reg.* v. *Master of Dulwich College*, 17 Q. B. 600; *Master, Pilots, &c. of Newcastle-upon-Tyne* v. *Bradley*, Id. 196; *S. C.*, 2 E. & B. 428, n. (*a*); *Bradley* v. *Master &c. of Newcastle*, 2 E. & B. 427.

and in which he passed his life. In all these cases evidence is admitted to expound the real meaning of the language used in an instrument, *in order to enable the Court or Judge to construe it,* and to carry such real meaning into effect.

As illustrating the subject before us, two recent cases may be mentioned. (1.) In *Leidemann* v. *Schultz* (c), it appeared that the defendant had chartered the plaintiff's vessel to proceed to Newcastle, and there to be ready forthwith, '*in regular turns of loading,*' to take on board a cargo of coal and coke. The Court of Common Pleas held, that, if there were a usage at the port in question which could explain this particular expression, evidence of such usage was quite admissible for that purpose. (2.) In *Brown* v. *Byrne* (d), the action was for freight by a shipowner against the indorsee of a bill of lading, which made certain goods deliverable to the order of the shipper or his assigns, he or they paying freight for the same at a certain rate per pound. The defendant having received the goods under the bill of lading, the question arose, whether he was entitled, by the custom of Liverpool, to claim a deduction of three months' discount from the freight? The Court held, on the authority of *Hutton* v. *Warren* (e), that he was so entitled, for "the contract settles the rate of freight: whether or not discount is to be allowed on the payment, it leaves open; and to that the custom applies."

Evidence to annex terms to written contract.

Not only may an expression which is susceptible of a technical meaning when occurring in a mercantile contract be thus, often, submitted for translation to the jury, but it is

(c) 14 C. B. 38.

See also *Caine* v. *Horsfall,* 1 Exch. 519; *Cockburn* v. *Alexander,* 6 C. B. 791; *Robertson* v. *French,* 4 East, 130; *Leeming* v. *Snaith,* 16 Q. B. 275; *Moore* v. *Campbell,* 10 Exch. 323.

(d) 3 E. & B. 703.

(e) 1 M. & W. 466.

clearly established that an incident may be *annexed to* a written contract, either by the usage of trade or by the common law of the land (*f*), in certain cases.

The custom of trade, which is a matter of evidence, may be used to annex incidents to *all* written contracts—commercial, agricultural, and others,—which do not by their terms exclude it, upon the presumption that the parties have contracted with reference to such usage, if it is applicable (*g*).

Incidents may also be annexed to a contract by the custom of the country, or by the common law (*h*).

As shewing that evidence of custom is admissible to *annex terms to* a written contract, provided they be not inconsistent with it (*i*), *Wigglesworth* v. *Dallison* (*k*) should be consulted. It was there held, that a tenant, by lease under seal, might give in evidence a custom of the country (*l*) that he should have the way-going crop after the expiration of his term, such custom not being repugnant to the express words and covenants of the lease. "The custom," said Lord *Mansfield*, "only superadds a right which is consequential to the taking—as a heriot may be due by custom, although not mentioned in the grant or lease."

In *Syers* v. *Jonas* (*m*), the contract under consideration

(*f*) *Gibson* v. *Small*, 4 H. L. Cas. 397.

(*g*) Id., ibid.

(*h*) Id., ibid. As to the admissibility of evidence of usage &c prevailing on a particular Stock Exchange, see *Pollock* v. *Stables*, 12 Q. B. 765; *Bayley* v. *Wilkins*, 7 C. B. 886; *Westropp* v. *Solomon*, 8 C. B. 345, where the cases are collected.

(*i*) As to this qualification of the rule, see post, p. 521.

(*k*) Dougl. 201, and 1 Smith L. C. 299, where the authorities are collected.

See also *Faviell* v. *Gaskoin*, 7 Exch. 273; *Hutton* v. *Warren*, 1 M. & W. 466.

(*l*) Ante, p. 11.

(*m*) 2 Exch. 113.

See also *Lockett* v. *Nicklin*, 2 Exch. 93.

of the Court was purely mercantile. It was for the sale of a specific parcel of tobacco which made no reference to any sample, and yet evidence was received to shew, that, by the usage of the tobacco trade, all sales were by sample, whether the contract did or did not so specify. The evidence proffered was here held to be receivable, upon the ground that the incident sought to be annexed to the written contract was not inconsistent with it, nor impliedly excluded by it; and the general rules laid down in former decisions were fully recognised and affirmed.

Again, in *Metzner* v. *Bolton* (*n*), the declaration stated that the plaintiff entered into the service of the defendant as a commercial traveller, at a yearly salary, and that the defendant agreed to continue him in his employ for a *whole year*, but discharged the plaintiff before the expiry of the time specified. To this declaration the plea was non assumpsit. At the trial the plaintiff himself was called as a witness, and in cross-examination admitted that there was a usage in the trade to dismiss *with three months' notice;* and the Court thought that evidence of this usage was properly admissible to *annex a term* to the written contract, for, "general usages are tacitly annexed to all contracts relating to the business with reference to which they are made, unless the terms of such contracts expressly or impliedly exclude them."

Evidence of usage inadmissible to vary the terms of a written contract.

The limitation of the leading rule just intimated is one to be carefully kept in view. Evidence of usage is inadmissible if it be inconsistent with, or if expressly or by implication it contradict, the terms of the written contract between the parties (*o*).

(*n*) 9 Exch. 518, cited per *Martin*, B., *Wheeler* v. *Baridge*, Id. 671.

(*o*) See Judgm., 3 E. & B. 703, cited post, p. 524, 1 Smith L. C., 3rd ed., p. 309; *Preston* v. *Merceau*, 2 W. Bl 1249.

This restriction of the rule may be illustrated by *Spartali* v. *Benecke* (*p*). There the action was brought for breach of a contract for the sale of wool by the plaintiffs to the defendants, the breach alleged in the declaration being, that the defendants refused to accept the said wool to the damage of the plaintiffs. To this declaration the defendants pleaded (inter alia), that the plaintiffs refused to deliver the goods in question, and also that they discharged the defendants from performance of the agreement on their part.

The written contract of sale in this case stipulated that the goods should be paid for by cash *in one month*, less discount. It appeared in evidence that the defendants had demanded the goods before the expiration of the month, but that the plaintiffs refused to deliver them unless paid for. Thus far, then, the plaintiffs had failed to shew a breach by the defendants of the contract declared upon, and in this perplexity they sought to prove, that, by the usage of the wool trade, a vendor selling under such a contract was not bound to deliver his goods without payment. The Judge at Nisi Prius, however, and the Court in banc, held that the evidence thus tendered by the plaintiffs was inadmissible, because the incident sought thereby to be annexed to the written contract was inconsistent with, and contradictory to, its terms.

Similar in principle to the foregoing decision, though bearing directly upon the law of landlord and tenant, is the

(*p*) 10 C. B. 212; *Hitchin* v. *Groom*, 5 C. B. 515. *Smith* v. *Jeffryes*, 15 M. & W. 561, will, if carefully scrutinised, be found useful, as shewing the difference which exists between evidence merely explanatory of the meaning of a word used in trade, and evidence which goes beyond this limit, and would have the effect of setting up a new contract between the parties. See also *Nichol* v. *Godts*, 10 Exch. 191, 194.

judgment in *Webb* v. *Plummer* (*q*). There it appeared that the plaintiff had held a farm under a lease containing a covenant, that the lessee should, on an assignment of the term, be paid by the incoming tenant for certain specified matters connected with the cultivation of the farm. The action was brought to recover a sum of money for *foldage* (*r*), being an allowance which, by the custom of the country, was payable to an outgoing by an incoming tenant, but which was not mentioned in the covenant. This evidence was held to be inadmissible, upon the ground that the express stipulation for certain specified allowances excluded a claim for any other matter; *Bayley*, J., observing, that if the lease had been silent as to the terms upon which the tenant was to quit, the custom of the country might have been relied upon as evidence in support of the right, but that the distinct mention of some allowances excluded others not named.

The following remarks of Mr. Justice *Coleridge*, delivering judgment in a recent case (*s*), exhibit so lucidly the foundation and limits of that particular rule of our law of evidence, to an examination of which this chapter is principally devoted, that any further comments having reference to it will be wholly needless. "Mercantile contracts," observes the learned judge, "are very commonly framed in a language peculiar to merchants: the intention of the parties, though perfectly well known to themselves, would often be defeated if this language were strictly construed

(*q*) 2 B. & Ald. 746.

See also *Re Stroud*, 8 C. B. 502, and cases there cited; *Clarke* v. *Roystone*, 13 M. & W. 752.

(*r*) See *Roberts* v. *Barker*, 1 Cr. & M. 808; Termes de la Ley, tit. "Faldage."

(*s*) *Brown* v. *Byrne*, 3 E. & B. 703, the facts in which case are shortly stated, ante, p. 519.

according to its ordinary import in the world at large; evidence, therefore, of mercantile custom and usage is admitted, in order to expound it and arrive at its true meaning. Again, in all contracts, as to the subject matter of which known usages prevail, parties are found to proceed with the tacit assumption of these usages; they commonly reduce into writing the special particulars of their agreement, but omit to specify these known usages, which are included however, as of course, by mutual understanding: evidence, therefore, of such incidents is receivable. The contract, in truth, is partly express and in writing, partly implied or understood and unwritten. But in these cases, a restriction is established on the soundest principle, that the evidence received must not be of a particular which is repugnant to, or inconsistent with, the written contract. Merely that it varies the *apparent* contract is not enough to exclude the evidence; for it is impossible to add any material incident to the written terms of a contract without altering its effect more or less. Neither in the construction of a contract among merchants, tradesmen, or others, will the evidence be excluded because the words are, in their ordinary meaning, unambiguous; for the principle of admission is, that words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that. What words more plain than 'a thousand,' 'a week,' 'a day'? Yet the cases are familiar in which 'a thousand' has been held to mean twelve hundred (*t*); 'a week' a week only during the theatrical season (*u*); 'a day' a working day (*x*). In such cases the

(*t*) *Smith* v. *Wilson*, 3 B. & Ad. 728, cited ante, p. 517, n. (*y*).

(*u*) *Grant* v. *Maddox*, 15 M. & W. 737.

(*x*) *Cochran* v. *Ritberg*, 3 Esp. 121

evidence neither adds to, nor qualifies, nor contradicts, the written contract; it only ascertains it by expounding the language" used by the contracting parties.

Questions as to admissibility and effect of evidence of usage, &c. how determined.

At this point of our inquiry, it may, perhaps, be asked—How are the various questions which arise respecting the construction of written contracts and the admissibility of evidence explanatory of them to be determined? Such questions, first, may be purely of law, for the opinion of the Court; or, secondly, may involve matter of fact as well as of law; or, thirdly, may be wholly for the jury. In regard to the two former classes of cases, the following remarks of *Erskine*, J., in *Shore* v. *Wilson* (*y*), will be found instructive:—

"The first general rule," says that learned Judge, "is, that all instruments in writing are to be construed by the Court (*z*), and the meaning of the terms employed is to be ascertained and fixed by reference to the whole instrument, but to nothing beyond it, unless specially referred to in the instrument itself. But this rule is subject to many exceptions. First, where the instrument is in a foreign language; in which case the jury must ascertain the meaning of the terms upon the evidence of persons skilled in the particular language. Secondly, if the instrument be a mercantile contract, the meaning of the terms must be ascertained by the jury, according to their acceptation amongst merchants. Thirdly, if the terms are technical terms of art, their meaning must in like manner be ascertained by the evidence of persons skilled in the art to which they refer. In such cases the Court may at once

(*y*) 5 Scott N. R. 988.

(*z*) The reason of this rule being, that the Court is supposed to be better qualified than a jury for discharging this duty, vide per *Maule*, J., 5 Scott N. R. 979.

determine, upon the inspection of the instrument, that it belongs to the province of the jury to ascertain the meaning of the words; and therefore that in the inquiry extrinsic evidence to some extent must be admissible" (*a*).

Besides the above, there are also some other cases in which the meaning of words employed in a written instrument is a fit subject of inquiry upon evidence before a jury; but these arise not out of the language of the writing itself, but in consequence of facts that are brought to the knowledge of the Court by evidence dehors the instrument. "In such cases, the first duty of the Court is to ascertain the meaning of the words themselves, taken in connection with the whole context, and next to apply them to their proper object. In ascertaining the meaning of any particular terms, the first rule is, that they are to be taken in their plain and ordinary meaning, unless from the context it should appear that the party had used them in a different sense. The first step in the inquiry, therefore, would be, whether it appears upon the face of the instrument itself that the writer has used the terms in any particular or extraordinary sense; for, if that should be the case, then the instrument must be construed according to that particular sense, whether more or less extensive than the primary meaning of the words themselves. But if no such intention appears upon the face of the writing, it then

(*a*) In *Lewis* v. *Marshall*, 7 M. & Gr. 743-4, the Court observe, "We take the acknowledged distinction to be this:—If the evidence offered at the trial by either party is evidence by law admissible for the determination of the question before a jury, the Judge is bound to lay it before them, and to call upon them to decide upon the effect of such evidence; but whether such evidence, when offered, is of that character and description which makes it admissible by law, is a question which is for the determination of the Judge alone, and is left solely to his decision."

becomes the duty of the Court to construe the words according to their plain, general, ordinary meaning (*b*), subject to certain qualifications. First, if the words used be technical terms of law, the Court must take them according to their strict legal acceptation, although in general and ordinary use they may have acquired a more extensive or a more limited sense; secondly, whether they are technical terms of law or words of ordinary use, the Court may give them a more enlarged or more limited construction, whenever it is found that they cannot otherwise be applied at all" (*c*).

In regard to the third class of cases, specified at p. 525, it will be sufficient to say, that where there is an election to be made between two meanings, either of which is assignable to a phrase or expression occurring in a written contract, or between two or more persons or things, to which such contract may relate, the question will properly be one for the jury, not for the Court, to determine (*d*).

(*b*) "The general rule," says *Tindal*, C. J., 5 Scott N. R. 1037, "I take to be, that, where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument or the subject matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that, in such case, evidence dehors the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible."

"Where the intention of the parties to a contract is sufficiently apparent, effect must be given to it in that sense, though some violence be thereby done to its words. Where the intention is doubtful, the safest course is to take the words in their ordinary sense." Per *Cresswell*, J., *Wilson* v. *Bevan*, 7 C. B., 684.

See *Covas* v. *Bingham*, 23 L. J., Q. B., 26; *Sweeting* v. *Darthez*, 14 C. B. 538; *Reid* v. *Fairbanks*, 13 C. B. 692; *Heseltine*, v. *Siggers*, 1 Exch. 856; per *Parke*, B., *Bland* v. *Crowley*, 6 Exch. 529.

(*c*) Per *Erskine*, J., 5 Scott N. R. 988-9.

(*d*) See per *Maule*, J., *Smith* v. *Thompson*, 8 C. B. 59.

Where, moreover, a question as to usage or custom arises upon a mercantile contract or upon a lease, and the jury are charged with its solution, the precise matter for their consideration will be this: whether there was a recognised practice and usage with reference to the transaction out of which the particular written contract, which is the subject matter of the action, arose, and to which it related, which gave a particular sense to the words employed in it, so that the parties might be supposed to have used the words in such sense (*e*); or whether there was, in truth, any local custom such as it had been proposed to annex to the written contract.

The character and description of evidence admissible for the purpose of thus annexing a term to a mercantile contract, is the *fact* of a general usage and practice prevailing in the particular trade or business, not the judgment and opinion of the witnesses who may be called to speak to it, for a contract may be safely and correctly interpreted by reference to the fact of usage, as it may be presumed that such fact was known to the contracting parties (*f*), and that they contracted in conformity thereto; but the judgment or opinion of the witnesses called affords no safe guide for interpretation, because such judgment or opinion must necessarily be confined to their own knowledge (*g*).

Again, in order to justify the jury in finding for the usage, it must be shewn to be *certain*, and to be *general*, in the branch of trade or business in regard to which it is set up, so as to authorise a presumption that it is known to those dealing or concerned in that branch of trade or business; for the rights of parties ought to be determined by law, and not by any vague, indeterminate, or partial usage of particular

(*e*) Judgm., 7 M. & Gr. 744.

(*f*) As to this presumption, see, however, the references, infra, n. (*i*).

(*g*) Judgm., 7 M. & Gr. 744.

persons or places. A strict adherence to this principle is essential to a sound and consistent administration of justice. A departure from it would work great injustice, for no man could know what were his rights or duties, if they were to be determined by loose evidence of custom or usage (*h*).

Notwithstanding the adverse opinions expressed by some eminent judges (*i*), in regard to the policy of admitting evidence of usage or custom to explain or *vary* (*k*) written instruments, it will be collected from what has been thus far said, that evidence of usage may be offered for various purposes in connection with their interpretation.

It may, for instance, in some cases be offered to annex incidents to them, to explain a particular word or phrase appearing therein, or to clear up and render definite and precise that which was indefinite and ambiguous. Confining my attention for a moment to the case of an *ambiguous* contract, we must remember that it always rests with the plaintiff suing ex contractu, to set forth in his declaration with precision the agreement upon which he relies, and should he at the trial fail in establishing such an agreement, he may be nonsuited, or, at all events, may have to apply for leave to amend (*l*). Again, should the contract

(*h*) *Berkshire Woollen Co.* v. *Proctor*, 7 Cushing (U. S.) R. 422; Judgm., *Re Stroud*, 8 C. B. 531.

(*i*) See, per Lord *Denman*, C. J., *Trueman* v. *Loder*, 11 Ad. & E. 597; Per *Story*, J., *Donnell* v. *Columbian Insur. Co.*, 2 Sumn. (U. S.) R. 377; Judgm., *Hutton* v. *Warren*, 1 M. & W. 475.

(*k*) The meaning of an instrument is, in truth, *varied* by annexing a term to it (see ante, p. 524), even though such term be not inconsistent with anything in the instrument.

(*l*) It is moreover a rule, that *ambiguum placitum interpretari debet contra proferentem:* Leg. Max., 2nd ed., p. 461; *Moore* v. *Forster*, 5 C. B. 220; *Ackroyd* v. *Smith*, 10 C. B. 182; Id., n. (*a*).

But, "if a declaration contains allegations capable of being understood in two senses, and if understood in one sense it will sustain the action, and in another it will

itself, which he then produces in evidence, be altogether ambiguous and meaningless, he will equally fail, because, as just observed, the onus is cast upon him of making out his right of action, and, further than this, of convincing the Court that the construction which he has put upon the particular contract in declaring, is the true one—all which he would have failed in doing if the matter were left at all doubtful.

An *Anonymous case*, illustrative of the foregoing remark, is adverted to by *Jervis*, C. J., on a recent occasion (*m*), where the jury found that the contract produced to them was '*quite unintelligible*;' and the Judge was held justified in ruling thereupon that the plaintiff had failed to sustain his declaration. The case of *Bowden* v. *French* (*n*) may also be consulted upon this subject. There the plaintiff declared against the defendant, who was a coal factor, for a breach of contract, in selling coals "*otherwise than for ready money*, to wit, *at two months credit*." In order to sustain his action, the plaintiff produced a letter of instructions from himself to the defendant, directing him to sell coal "*at such price as would realise* not less than —— per ton *net cash*." He proved also, that the coal in question had been sold at a credit of two months; but it

not, *after verdict* it must be construed in the sense which will support the action." Per Lord *Truro*, *Emmens* v. *Elderton*, 13 C. B. 542.

"In pleading (except in deducing title), a deed may be set out, either in its terms, leaving the Court to construe it according to the legal effect of those terms, or the party may take the responsibility of stating it according to the legal effect which it is contended to have." Judgm., *Lord Newborough* v. *Schröder*, 7 C. B. 397.

Where a *promise* is ambiguous, it is to be construed "according to the sense in which the promisor must be supposed to wish and to believe that the promise should be understood by the promisee." Judgm., *Mowatt* v. *Lord Londesborough*, 23 L. J., Q. B., 177, 184.

(*m*) 10 C. B. 889. See *Duncan* v. *Topham*, 8 C. B. 225.

(*n*) Id. 886.

appeared to be customary in the coal trade to sell coal at such credit, unless it was sold on the wharf. The Court were of opinion that the letter of instructions was essentially ambiguous in its terms—admitting of at least three different significations—and that, regard being had to the usage proved at the trial, the meaning which the plaintiff himself had assigned to the instructions was not the true one. In this case, accordingly, the plaintiff was nonsuited.

In the preceding chapter I have not (as may have been remarked) attempted to enter generally upon an examination of even the leading rules of construction applicable to written contracts; to do so efficiently would have required an amount of space which is not at my disposal; at its conclusion I cannot, however, forbear from laying before the student the following brief epitome of some of the rules alluded to—so worded as perchance, without much effort, to fix itself in the memory:—

"The sages of the law," it has been said (*o*), "in the exposition of treaties, pacts, statutes, testaments, deeds, and other instruments, have used and handed down to us rules which are commended as the dictates of enlightened reason and common sense," whereof the following will suffice for the present, viz.—

1. That the construction be made on the entire instrument, and that one part of it do help to expound another, and that every word (if it may be) may take effect, and none be rejected (*p*), and that all the parts do agree together, and there be no discordance therein—*ex antecedentibus et consequentibus est optima interpretatio*, for *turpis est*

(*o*) See arg., *Randon* v. *Toby*, 11 Howard (U. S.) R. 511.

(*p*) See *Walker* v. *Giles*, 6 C. B. 662.

pars quæ cum suo toto non convenit, maledicta expositio quæ corrumpit textum.

2. That the construction be such as that the whole and every part of it may take effect, and as much effect as may be for that purpose for which it was made (*q*).

3. To cavil about the words in subversion of the plain intent of the parties is a malice against justice and the nurse of injustice (*r*).

4. A man ought not to rest on the letter only, *nam qui hæret in literâ hæret in cortice,* but he ought to rely upon the sense, which is the kernel and the fruit, whereas the letter is but the shell (*s*).

5. *Falsa orthographia, falsa grammatica non vitiat cartam vel concessionem;* nor the singular instead of the plural number, nor the plural instead of the singular (*t*).

6. The office of a good expositor is to make construction on all the parts together of an instrument, and not of one part only by itself—*nemo enim aliquam partem recte intelligere possit antequam totum iterum atque iterum perlegerit* (*u*).

7. Construction must be made in suppression of the mischief and in advancement of the remedy (*x*).

Should the construction proffered of an instrument be found to violate any of the rules above laid down, ex. gr. by dwelling upon a word only in disregard of the preceding and succeeding parts; should it corrupt the text or go but skin deep into its meaning, overlooking the general purport and effect of the writing—we may at once reject it as fallacious, as based on wrong principles, and likely to frustrate rather than effectuate the intention of the contracting parties.

(*q*) Shepp. Touch. 87.

(*r*) See *Throckmerton* v. *Tracy,* Plowd. 161.

(*s*) *Eyston* v. *Studd,* Plowd. 467.

(*t*) *Earl of Shrewsbury's case,* 9 Rep. 48 a; Co. Litt. 146. b.

(*u*) *Lincoln College case,* 3 Rep. 59 b; 8 Vin. Abr. 181.

(*x*) Co. Litt. 381. b.

CHAPTER V.

THE CAPACITY TO CONTRACT—HOW IT MAY BE AFFECTED.

I HAVE now to speak of the capacity to contract—to shew how in some cases this capacity may be affected by the character with which a contracting party is clothed—how, in other cases, where the capacity to contract remains unimpaired, the mode of contracting is nevertheless subjected to modification.

The matters intended for consideration in this chapter seem naturally to subdivide themselves into two branches, of which the first will involve an examination of contracts by Mercantile Persons, to wit, Principal and Agent—Partners—Incorporated Bodies—Bankrupts; and the second will include such inquiries as may appear requisite in regard to contracts by Non-mercantile Persons, by Femes Coverts, Infants, Non Compotes Mentis, Executors, Administrators, and Insolvents.

In treating of contracts by the particular parties just enumerated, I shall endeavour strictly to confine my attention to the subject which is indicated by the general heading of this Chapter, referring, for full information respecting the various topics touched upon, to such standard works relating to them as will from time to time be specified.

SECT. 1.—*Contracts with Mercantile Persons.*

In treating of the mode of contracting by mercantile persons, of the manner in which their contracts may be affected by the characters which they have assumed, or by the rela-

tions which exist between them, some brief remarks must first be made on the relation of principal and agent, which is one of paramount importance in regard to the proposed inquiry.

"Agency," says Mr. Chancellor Kent in his Commentaries (*a*), "is founded upon a contract, either express or implied, by which one of the parties confides to the other the management of some business to be transacted *in his name* or *on his account*, and by which that other assumes to do the business and to render an account of it." As the obligatory force of a contract rests on the consent of the contracting parties (*b*), so the authority of an agent to contract for his principal rests on the consent of his principal; and the question, whether there was consent to the contract or to the authority, is to be tried according to the general principles for trying other questions (*c*).

The maxim of the Roman law, *qui mandat ipse fecisse videtur* (*d*), indicates briefly, but correctly, the ground of liability of a principal for the act of his agent; and, in the 6th Book of the Decretals (*e*), (which are a component part of the Corpus Juris Canonici (*f*)), we meet with the same rule, expressed almost in the form which is so familiar to our lawyers, *qui facit per alium est perinde ac si faciat per seipsum.*

The mere enunciation of the rule just stated, shews us how wide must be its practical applicability; and a little reflection will convince us, that comparatively few mercantile

(*a*) 7th edit. Vol. 2, p. 784.

(*b*) Ante, p. 260.

(*c*) Per *Erle*, J., *Frost* v. *Oliver*, 2 E. & B. 318.

Obligatio mandati consensu contrahentium consistit. D. 17. 1. pr.

(*d*) *Mandare* est gerendum quid alicui committere. Brisson. ad verb. 'Mandare.'

(*e*) Ad finem. (Reg. Jur. 72).

(*f*) As to which see Irving's Civ. L. 4th edit. pp. 231—235.

transactions, or contracts made in the ordinary course of life, are conducted exclusively by the principals, and without the intervention of any third party. A merchant, for example, employs his clerk to write his usual business letters, to keep his books, and, not unfrequently, to conduct his most confidential and important negotiations. So, if a person enters a shop, in order to purchase the common necessaries of life, he will, in most cases, have to deal, not immediately with the principal, but with his servant or agent, entrusted with the management of his business, whose duty it is to hand over to customers such things as may be required, and who is authorised to receive for them the price.

It is, moreover, a true proposition, subject only to some few exceptions, that "whatever a man sui juris may do of himself he may do by another" (*g*); and hence we may readily infer, that the matters transacted through the medium of agents are vastly multifarious. The question, indeed, in all cases in which a plaintiff seeks to fix a defendant with liability upon a contract, express or implied, must necessarily be "whether such contract was made by the defendant by himself *or his agent*, with the plaintiff *or his agent*" (*h*), and not merely whether the contract was entered into by the parties treating directly with each other.

There are, indeed, some persons, ex. gr. infants, married

(*g*) Story on Agency, 4th edit. p. 3.

To the above rule there are, however (as intimated in the text), some exceptions. Thus, in *Combes's case*, 9 Rep. 76 a, it is said, that, "there are some things personal and so inseparably annexed to the person of a man that he cannot do them by another." So the performance of a work of taste or art confided to A. could not by him be delegated to B.; nor could a judicial officer, unless under some special statutory provision, depute his functions to another.

(*h*) Judgm., 15 M. & W. 526.

women, idiots, lunatics, and outlaws, who, for reasons which will be specified in the subsequent section of this Chapter, are wholly or partially incapable of contracting, and who are, therefore, to a like extent incapacitated from contracting by agent (*i*). But, on the other hand, it by no means follows, that a person incapable of contracting on his own behalf is incapacitated from acting as agent for another; thus, a married woman may plead her coverture in answer to an action brought against her as indorser of a promissory note, but she may bind her husband by indorsing it in his name, provided she be duly authorised by him for that purpose (*j*). So, an infant may, in many cases, act as agent for an adult (*k*).

The authority confided to an agent may be of one or other of three kinds: There may be 1. an express limited authority given to the agent to do some particular act, or to make some particular contract; 2. a larger authority, to make all contracts, or to do all acts connected with a particular trade, business, or employment (*l*); or, 3. an authority to do all acts, without reference to their precise character, which the principal may personally do, and which he may, without violating the law, do by deputy. The first of these three kinds of authority will suffice to constitute a *special*, the second, to constitute a *general*, the third, to constitute an *universal*, agency; but, as this last species of agency is (as may readily be supposed) of very rare occurrence, we may here properly confine our attention to the two former kinds.

Of a *special* agency, an example would occur, if I com-

(*i*) Story on Agency, 4th edit. p. 6.

(*j*) *Lord* v. *Hall*, 8 C. B. 627; *Lindus* v. *Bradwell*, 5 C. B. 583; *Cotes* v. *Davis*, 1 Camp. 485. See *Smith* v. *Marsack*, 6 C. B. 486.

(*k*) Co. Litt. 52. a. See *Lord* v. *Hall*, supra.

(*l*) Story on Agency, 4th edit. p. 19.

missioned a friend to purchase a specific thing for me and on my account; of a *general* agency, where my servant orders goods of the neighbouring tradesmen for my use, without any express instructions from me, but in the usual and admitted course of his duty (*m*).

In relation to this latter kind of agency, Dr. Story (*n*) remarks, that "one man may be a general agent for his principal in one business, and another may be his general agent in another business; and, in such case, each agent will be limited in his authority to the particular business within the scope of his peculiar agency." Thus, "if a man should be at once a banker and a merchant, carrying on each business distinctly, with separate clerks and agents for each branch, an agent in the one would not be deemed to possess any authority to act in the other; although each would or might, in a legal sense, be deemed a general agent."

Fact of agency how proved—

The *fact* of agency may be proved by proving an express authority given to the alleged agent; by shewing circumstances from which the requisite authority must necessarily or may reasonably be inferred; or by establishing the existence of a particular relation between parties whence an authority to contract will be implied by law: for instance, the relation of partners, by which relation, when complete, one partner becomes at common law the agent of the firm for all purposes necessary for carrying on their particular partnership, whether general or special, or usually belonging to it (*o*); or the relation of husband and wife, in which the law, under certain circumstances, considers the husband to make his wife an agent (*p*).

(*m*) See, per Lord *Abinger*, C. B., 2 M. & W. 181.

(*n*) Story on Agency, 4th ed. p. 23.

(*o*) Judgm., 15 M. & W. 527; post. p. 559.

(*p*) Post.

—in an action for goods sold and delivered, &c.

To explain and illustrate these remarks, let us suppose that an action for goods sold and delivered, or for work and labour, is brought by A. against B. The plaintiff, on whom, in such a case, the burthen of proof lies, must, in order to recover against the defendant, shew that he (the defendant) contracted expressly or impliedly with the plaintiff; expressly, by making a contract with the plaintiff; impliedly, by giving an order to him under such circumstances as shew that it was not to be gratuitously executed; and if the contract was not made by the defendant in person, it must be proved that it was made by an agent of the defendant duly authorised, and that it was made as his contract (*q*). Assuming that the contract in the given case was made by a third person, the point for decision will be—whether that third person was an agent for the defendant for the purpose of making it, and *made the contract as such* (*q*).

Now, in accordance with what has been already said (*r*), the agency may, under the circumstances supposed, be constituted by an express limited authority to make such a contract, or a larger authority to make all contracts falling within the class or description to which it belongs, or a general authority to make any; or it may be proved by shewing that such a relation existed between the parties as by law would create the authority. If proof to such effect be given, and if further it be shewn that the agent in making the contract acted on the authority given to him, the principal will be bound by the contract, and the agent's contract will be his contract, *but not otherwise* (*s*).

Agency, then, may be created by the *immediate act* of

(*q*) Judgm., *Reynell* v. *Lewis*, and *Wyld* v. *Hopkins*, 15 M. & W. 527. See *Higgins* v. *Hopkins*, 3 Exch. 163; *Bailey* v. *Macauley*, 13 Q. B. 815.

(*r*) Ante, p. 536.

(*s*) Judgm., 15 M. & W. 527.

the principal, that is, by really giving authority to the agent, or representing to him that he is to have it; or by constituting that relation to which the law attaches agency. It may also be created by the *representation of the defendant to the plaintiff* that the party making the contract is the agent of the defendant, or that such relation exists as to constitute him agent; and if the plaintiff really makes the contract on the faith of such representation, the defendant is bound, because he is estopped from disputing the truth of it with respect to that contract; and the representation of an authority is, quoad hoc, (by virtue of the doctrine of estoppel) precisely the same thing as a real authority given by the defendant to the supposed agent. This representation may be made *directly to the plaintiff*, or made *publicly*, so that it may be inferred to have reached him, and may be made by *words* or *conduct* (*t*).

Upon none of the foregoing propositions is there any doubt; and the true decision of all questions involving the law of agency depends upon the proper application of the principles set forth in them to the facts; such application being made by the jury, with due assistance from the Judge.

Assuming that an agency of some kind does in any given case exist, an important difference is to be noted between a 'general' and a 'particular' agency; for, "if a particular agent exceed his authority, his principal is not bound by what he does; whereas, if a general agent exceed his authority, his principal *is* bound, provided what he does is

(*t*) Judgm., 15 M. & W. 527-8, 530, where the operation of the above rule is explained. Judgm., *Freeman* v. *Cooke*, 2 Exch. 662. See also the cases cited Broom's Pract., vol. 1, pp. 404, 412; *Landman* v. *Entwistle*, 7 Exch. 632; *Watson* v. *Earl of Charlemont*, 12 Q. B. 856.

within the *ordinary and usual scope* of the business which he is deputed to transact" (*u*). So, if one person authorises another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent is the real authority, because strangers can only look to the acts of the parties, and to the external indicia of property, and cannot know the private communications which may pass between a principal and his agent (*v*). If, however, a shopman, who is authorised to receive payment for goods sold *over the counter only*, receives money elsewhere than in the shop, that payment would not necessarily be good. The principal might be willing to trust the agent to receive money for him in the regular course of business in the shop when the latter was under his own eye, or under the eyes of those in whom he had confidence, but he might not wish to trust the agent with the receipt of money elsewhere (*x*).

Without attempting to cite many cases upon the point before us, I may observe, that the decision in *Cox* v. *The Midland Counties Railway Company* (*y*) has peculiar interest with reference to the power possessed by an agent to bind his principal ex contractu. It was there held, that the station master of a railway company could not bind the company by a contract for surgical attendance on an injured passenger without *express* authority for that purpose, for the employer of an agent for a particular purpose gives only the authority necessary for that agency *under*

(*u*) Smith Lects. on Contracts, p. 246; Smith Merc. L. 4th edit. p. 116.

(*v*) Per *Lord Ellenborough*, C. J., *Pickering* v. *Busk*, 15 East, 38; *Whitehead* v. *Tuckett*, Id. 400.

(*x*) Judgm., *Kaye* v. *Brett*, 5 Exch. 274; Story on Agency, 4th ed. p. 113.

(*y*) 3 Exch. 268. Another point raised in this case was, as to the power of the company to appoint the servant, who assumed to act in their behalf, without an instrument under seal—as to which, see post, title "Corporation." See also *Giles* v. *The Taff Vale R. C.*, 2 E. & B 822.

ordinary circumstances, or the powers *usually exercised by similar agents*, if there be any evidence to shew a particular usage. "Could it," asked the Court, "be maintained that a coachman, from whose carriage a passenger had fallen and broken his arm, or by which another person had been run over, ... could bind his master by a contract with a surgeon to cure the injured person, and oblige his master to pay the bill? We are of opinion that he could not."

Authority of agent extends to matters incidental to subject-matter of agency

The authority, however, confided to an agent must, unless a contrary intention manifestly appears, be understood as extending to everything which is *necessary for* or usually *incidental to* exercising it with effect, or carrying out the object for which it was entrusted (*z*). For instance, an attorney, having been once retained in an action, has clearly cast upon him the duty of taking the necessary steps during its progress, but is not obliged to consult his client, or to seek specific instructions from him prior to each successive step in the action. Where, therefore, the town council of a borough retained an attorney to take proceedings in opposition to a rule nisi for a mandamus which had actually been obtained against them, and (the rule having been made absolute) they ordered their return to the writ

(*z*) Story on Agency, 4th edit. p. 77; *Bayley* v. *Wilkins*, 7 C. B. 886; *Westropp* v. *Solomon*, 8 Id. 345. "A master who sends his servant to buy goods, and gives him no money to pay, doubtless authorises him to pledge his credit; and a person who employs an agent to purchase goods on the usual terms of any particular trade, gives the like authority, and so in other instances." Judgm., 9 M. & W. 718.

In the above and similar cases, the rule of law and common sense applies *quando aliquid mandatur—mandatur et omne per quod pervenitur ad illud* (5 Rep. 116); a rule of which the precise mode of application must of course depend upon the *particular kind of agency* which may chance to be in question, and the nature and extent of the authority usually conferred thereby.

of mandamus to be filed, this was held to be a sufficient authority for the attorney to appear for the corporation at the trial of certain issues raised on the return (*a*).

Let us take, on the other hand, the case of an attorney who (without having a general retainer) is authorised to do some particular act, his authority will then necessarily be confined to doing such act; and his right to recover for work done and matters incidental thereto, as against his client, will depend upon whether the business charged for fell within the scope of the authority with which he was invested or not (*b*). An attorney is not justified in pledging his client's credit to a bailiff or other officer for fees, which, according to the usual course of practice, he ought, in the first instance, to pay out of his own pocket (*c*).

Much difficulty often exists in determining the extent of the *implied* authority of an agent; and, in reference to this point, where it arises, the nature of the agency in question, and the law applicable to it, will demand special consideration (*d*). A bare allusion to the important subject here mentioned must, in an elementary work like the pre-

(*a*) *Reg.* v. *Town Council of Lichfield*, 10 Q. B. 534.

(*b*) See *Dawson* v. *Lawley*, 4 Esp. 65.

As to the duty of an attorney who has been retained to conduct a suit, see *Whitehead* v. *Lord*, 7 Exch. 691; *Harris* v. *Osbourn*, 2 Cr. & M. 629.

As to his power to refer it, see *Smith* v. *Troup*, 7 C. B. 757, 764; *Faviell* v. *Eastern Counties R. C.* 2 Exch. 344, 351; *Filmer* v. *Delber*, 3 Taunt. 486.

(*c*) *Maile* v. *Mann*, 2 Exch. 608, and cases there cited.

(*d*) *Hawtayne* v. *Bourne*, 7 M. & W. 595, should be consulted in regard to the implied authority of an agent. It was there held, that the resident agent appointed by the directors of a mining company to manage the mine, is not *impliedly* authorised by the shareholders of the company to borrow money upon their credit in any case of necessity, however pressing. See particularly the judgment of *Parke*. B., in the above case: *Ricketts* v. *Bennett*, 4 C. B. 686; *Burmester* v. *Norris*, 6 Exch. 796; *Tredwen* v. *Bourne*, 6 M & W. 461.

sent, be deemed sufficient. I may, however, add, that an inquiry as to the peculiar power possessed by the master of a ship in urgent cases to pledge the credit of the owner for repairs done to her, &c. (*e*)—to sell or hypothecate the ship and cargo (*f*)—will illustrate the force of the remark just made, and amply repay the student.

Did the agent contract as such?

Besides the difficulty just indicated, another, having reference to fact rather than to law, not unfrequently presents itself, viz. in determining whether the particular act or transaction, in virtue of which it is sought to charge a supposed principal, was done by, or took place with, the agent *in that character* or on his own individual account; this question will obviously require solution by the jury. Its nature may be illustrated by the cases below cited (*g*).

What was the meaning and intention of the contracting parties?

Again, inasmuch as "a person acting in the capacity of an agent *may* undoubtedly contract in such a manner as to make himself personally liable" (*h*), the meaning and intention of the parties at the time of entering into an alleged contract, must be considered with a view to determining the

(*e*) *Arthur* v. *Barton*, 6 M. & W. 138; *Edwards* v. *Havill*, 14 C. B. 107; *Beldon* v. *Campbell*, 6 Exch. 886; *Johns* v. *Simons*, 2 Q. B. 425; *Stonehouse* v. *Gent*, Id. 431 (a); *Frost* v. *Oliver*, 2 E. & B. 301.

(*f*) *The Gratitudine*, 3 Rob. 240; *Stainbank* v. *Fenning*, 11 C. B. 51, 88; *Stainbank* v. *Shepard*, 13 C. B. 418; *Vlierboom* v. *Chapman*, 13 M. & W. 230, 239; *Hunter* v. *Parker*, 7 M. & W. 322; *Benson* v. *Duncan*, 3 Exch. 644, *S. C.* 1 Exch. 537; Abbott, Shipp. p. 371. See *Atkinson* v. *Stephens*, 7 Exch. 567. Generally as to the duty of the master in case of damage to the ship, see *Benson* v. *Chapman*, 8 C. B. 950, *S. C.* 5 C. B. 330, 6 M. & Gr. 792; Story on Agency, 4th edit. pp. 139—148. The extent of the master's authority, as agent for the shipowner, is shortly stated in Broom's Pr., Vol. 1, pp. 390-1, where some additional cases on this subject are collected.

(*g*) See *Holcroft* v. *Hoggins*, 2 C. B. 488; *Parrott* v. *Anderson*, 7 Exch. 93; *Williams* v. *Deacon*, 4 Exch. 397; *Thompson* v. *Bell*, 10 Exch. 10; *Wilkinson* v. *Candlish*, 5 Exch. 91; *Jones* v. *Hughes*, Id. 104; *Cooke* v. *Seeley*, 2 Exch. 746.

(*h*) Per *Ashhurst*, J., *Macbeath* v. *Haldimand*, 1 T. R. 181.

liability upon it, and in all cases of the kind alluded to the true question will be, "whether, from anything that passed between the parties at the time, it was understood by them that the plaintiff was to rely upon the personal security of the defendant" (*i*); for it will not suffice that credit was given to the latter party *unless he has pledged his credit* either expressly or by implication (*j*).

Respective liability of principal and agent in certain cases.

I will now lay down a few leading propositions, and pass under review a few cases, shewing the respective liability of principal and agent on a contract by the agent, 1. oral, wholly or in part; 2. written, but not under seal; 3. by specialty. The inquiry here suggested, however briefly conducted, will be useful, as throwing some further light upon the relative position of principal and agent; the capacity of a soi-disant agent to bind his principal; and the mode in which, with a view to his own protection from liability, an agent should contract.

Purchase of goods by agent.

1. Of contracts by an agent, oral, wholly or in part, the contract of sale specially claims our attention; and in the first instance, it will be well, therefore, to determine what are the rights of the seller of goods where the purchase has been made by an agent for a principal disclosed or undisclosed, and whether residing in this country or abroad, at the time of the contract. Now, the law upon this subject was fully discussed in three leading cases (*k*), viz. *Paterson* v. *Gandasequi* (*l*), *Addison* v. *Gandassequi* (*m*), and *Thom-*

(*i*) Per *Ashhurst*, J., ubi. supra; *Pennell* v. *Alexander*, 3 E. & B. 283.

(*j*) *Autey* v. *Hutchinson*, 6 C. B. 266, (in connection with which case, see 12 & 13 Vict. c. 101, s. 8); *Marsh* v. *Davies*, 1 Exch. 668; see *Chambres* v. *Jones*, 5 Exch. 229; *Moffatt* v. *Dickson*, 13 C. B. 543.

(*k*) See the note appended to these cases in Mr. Smith's Selection, Vol. 2, p. 222.

(*l*) 15 East, 62.

(*m*) 4 Taunt. 574.

son v. *Davenport* (*n*), upon which is wholly founded the legal doctrine recognised at this day as applicable to it (*o*).

The rules thus settled and established may be briefly stated as under:—

Where an agent contracts for the *purchase* of goods *as principal*, he, by so doing, incurs a personal liability; and if the real principal be *known* to the vendor at the time of a contract for the sale of goods being entered into by the agent dealing in his own name, and *credit be given to the agent*, this latter party only can be sued on the contract (*p*). If, however, in this case, the seller of the goods make his election *to debit the principal*, he cannot afterwards resort to the agent (*q*). The question whether credit was given to the agent or to the principal being for the jury, for whose guidance in resolving it, evidence of custom and usage will, subject to the remarks made in the preceding chapter upon that subject, be admissible (*r*).

Where the real principal in a contract for the purchase of goods (residing in this country) is *unknown* at the time of contracting, whether the agent represent himself as agent or not, the vendor may, on discovering the principal, *debit either* at his election (*s*), unless, indeed, something has been done to shew an election on the part of the seller to take

(*n*) 9 B. & C. 75.

(*o*) Per *Maule*, J., *Smyth* v. *Anderson*, 7 C. B. 34.

(*p*) *Paterson* v. *Gandasequi*, 15 East, 62; *Addison* v. *Gandasequi*, 4 Taunt. 574; *Thomson* v. *Davenport*, 9 B. & C. 78.

(*q*) Per *Lord Tenterden*, C. J., and *Littledale*, J., *Thomson* v. *Davenport*, supra.

(*r*) *Bayliffe* v. *Butterworth*, 1 Exch. 425; *Sutton* v. *Tatham*, 10 Ad. & E. 37; *Dails* v. *Lloyd*, 12 Q. B. 531; *Pollock* v. *Stables*, Id. 765; *Johnstone* v. *Usborne*, 11 Ad. & E. 549; *Trueman* v. *Loder*, Id. 589; and cases cited ante, pp. 521 et seq.

(*s*) *Thomson* v. *Davenport*, 9 B. & C. 78. Per *Parke*, J., *Robinson* v. *Gleadow*, 2 Bing. N. C. 161, 162; *Paterson* v. *Gandasequi*, 15 East, 62; *Railton* v. *Hodgson*, 4 Taunt. 576, n. *Wilson* v. *Hart*, 7 Taunt. 295.

the agent as the actual buyer (*t*), and to exonerate the principal (*u*).

"I take it to be a general rule," says Lord *Tenterden*, C. J., in *Thomson* v. *Davenport* (*v*), "that if a person sells goods, (supposing at the time of the contract he is dealing with a principal), but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal; subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal," who in the case here put "is the real buyer, and ought to pay, *unless there be something in the transaction which makes it inequitable or unjust that he should pay*" (*x*).

The rule just stated, however, that an undisclosed principal may, when ascertained, be debited by the vendor of goods, is further subject to certain exceptions depending upon the usage of trade and the mutual understanding between parties which results therefrom (*y*). Thus, where a British merchant effects a purchase for a foreign principal, credit is primâ facie considered as having been given exclusively to the former (*z*), although evidence will be admissible to shew a different intention (*a*).

(*t*) Per *Maule*, J., *Smyth* v. *Anderson*, 7 C. B. 34.

(*u*) Per *Bayley*, J., 9 B. & C. 89.

(*v*) 9 B. & C. 86.

(*x*) Per *Maule*, J., *Smyth* v. *Anderson*, 7 C. B. 35; *Heald* v. *Kenworthy*. (Exch.), 19 Jur. 70.

(*y*) See per *Bayley*, J., *Power* v. *Butcher*, 10 B. & C. 339—341; per Lord *Ellenborough*, C. J., *Jenkins* v. *Power*, 6 M. & S. 287.

(*z*) *Thomson* v. *Davenport*, 9 B. & C. 87, 88; *Paterson* v. *Gandasequi*, 15 East, 69; *Smyth* v. *Anderson*, 7 C. B. 21; *Wilson* v. *Zulueta*, 14 Q. B. 405, 414; *Poirier* v. *Morris*, 22 L. J., Q. B., 313. See *Peterson* v. *Ayre*, 13 C. B. 353; *Pennell* v. *Alexander*, 3 E. & B. 283.

(*a*) *Mahony* v. *Kekulé*, 14 C. B. 390. Per *Parke*, B., *Heald* v. *Kenworthy*. (Exch.), 19 Jur. 71.

Again, if an agent makes an oral contract *in his own name*, the principal may *sue* as well as *be sued* upon it; for it is a general rule, that whenever an express contract is made, an action is maintainable upon it, either in the name of the person with whom it was *actually* made, or in the name of the person with whom *in point of law* it was made (*b*).

Sale of goods by agent.

Where, however, a principal permits his agent to *sell* goods as apparent principal, and afterwards intervenes, the buyer is entitled to be placed in the same situation at the time of the disclosure of the true principal as if the agent had been the real contracting party, and is entitled to the same defence, whether it be by common law or by statute—by payment or by set-off—as he was entitled to at that time against the agent, the apparent principal (*c*). And, even where a party contracts with a known agent or factor intrusted with goods for their purchase, having notice that the vendor is an agent merely, and pays for the goods in pursuance of the contract, such contract and payment, if made in the ordinary course of business, and without notice that the agent is not authorised to sell, will be binding upon, and good against, the real owner (*d*).

(*b*) *Cothay* v. *Fennell*, 10 B. & C. 671; *Sims* v. *Bond*, 5 B. & Ad. 323. The *agent* was held entitled to sue in *Tassell* v. *Cooper*, 9 C. B. 509; *Holt* v. *Ely*, 1 E. & B. 795.

(*c*) Judgm., *Isberg* v. *Bowden*, 8 Exch. 859; *Tucker* v. *Tucker*, 4 B. & Ad. 750; *Carr* v. *Hinchliff*, 4 B. & C. 547; *George* v. *Clagett*, 7 T. R. 359, *Rabone* v. *Williams*, Id. 360, (*a*); *Wake* v. *Tinkler*, 16 East, 36.

The rule stated in the text is most frequently acted upon in sales by factors, agents, or partners, in which cases either the nominal or real contractor may sue; but it may be equally applied to other cases. Judgm., *Sims* v. *Bond*, 5 B. & Ad. 393.

The rule in question is not, however, applicable where the buyer of goods knows that the vendor sells *as factor*. *Fish* v. *Kempton*, 7 C. B. 687, 691.

(*d*) 6 Geo. 4, c. 94, ss. 2, 4. See also 5 & 6 Vict. c. 39, ss. 1, 3, by which a like protection is extended to bonâ fide *advances* upon goods

Liability of agent who contracts without authority.

Where an individual. assuming to act in the capacity of agent for another acts in truth, without authority from him, the pretended principal will not, subject to the remarks already made upon this subject (*e*), be bound by such acts, and the remedy (if any) must be had against the party assuming to contract (*f*). For instance, if "A. employs B. to work for C. without warrant from C., A. is liable to pay for it (*g*);" nor will it make any difference if B., in truth, believed A. to be the agent of C. (*h*); for, in order to charge C., B. would have to prove a contract with him, express or implied, and with him in the character of principal, either directly or through the intervention of some third person (*i*). A familiar instance, illustrative of this remark, occurs where an action is brought against a candidate for electioneering expenses, or for goods supplied on his credit, but ordered by a third party, assuming to act for him. Here the fact of agency must be clearly established—that is to say, it must be shewn that the alleged agent was employed by the defendant alone, or jointly with others, or that he was employed by some third party, who was himself duly authorised by the defendant for such purpose; and an action would fail if it appeared that the defendant, instead of being a principal, was only an agent, and known to be such, and had, in fact, not contracted on his own account at all (*k*).

and merchandise in the hands of an agent, made under similar circumstances.

(*e*) Ante, pp. 539—541.

(*f*) *Woodin* v. *Burford*, 2 Cr. & M. 391; *Wilson* v. *Burthrop*, 2 M. & W. 863; *Fenn* v. *Harrison*, 3 T. R. 757; *Polhill* v. *Walter*, 3 B. & Ad. 114. Per Lord *Abinger*, C. B., *Acey* v. *Fernie*, 7 M. & W. 154.

(*g*) *Ashton* v. *Sherman*, Holt, 309; cited 2 M. & W. 218.

(*h*) *Thomas* v. *Edwards*, 2 M. & W. 215.

(*i*) Judgm., 2 M. & W. 216, 217; *Turner* v. *Mayor of Kendal*, 13 M. & W. 171; *Spurrier* v. *Allen*, 2 C. & K. 210; *Redmond* v. *Smith*, 8 Scott, N. R. 250.

(*k*) See *Thomas* v. *Edwards*, 2 M. & W. 215; *Higgins* v. *Hopkins*, 3 Exch. 166.

A mere agent, indeed, who gives an order *as such*, and contracts orally *for another*, cannot, under ordinary circumstances, be made personally liable upon such contract, by reason of the want of privity in law between himself and the other contracting party (*l*). And, to a like reason may be referred the rule, that a servant of the Crown, contracting in his official capacity, is not thus rendered individually responsible; the rule, or rather legal presumption, which in this case excludes personal liability, being clearly in accordance with public policy, inasmuch as no prudent person would accept a public situation at the hazard of exposing himself to a multiplicity of suits by parties thinking themselves aggrieved (*m*). Commissioners also, and trustees appointed for carrying out undertakings sanctioned by Parliament, will not, in general, incur liability on contracts made in connection with the subject-matter of the trust confided to them (*n*)—"When," remarks Lord *Eldon* (*o*), "persons act under a Parliamentary trust, and state themselves as so acting, they are not to be held personally liable;" though if, in any particular case, evidence be adduced to shew that they pledged their personal credit, a different result will follow (*p*).

Notwithstanding the general rule, however, as to the non-

(*l*) Ante, p. 326; *Depperman* v. *Hubbersty*, 17 Q. B. 766, 771.

(*m*) Per *Dallas*, C. J., *Gidley* v. *Lord Palmerston*, 3 B. & B. 286, 287; Per *Ashhurst*, J., *Macbeath* v. *Haldimand*, 1 T. R. 181, 182; *Rice* v. *Chute*, 1 East, 578; *Rice* v. *Everett*, Id. 583, n. (*a*); *Myrtle* v. *Beaver*, Id. 135; *Atlee* v. *Backhouse*, 3 M. & W. 633; *Rex* v. *The Lords Commissioners of the Treasury*, 4 Ad. & E. 286, 298.

(*n*) *Andrews* v. *Dally*, 4 Bing. 566; *Allan* v *Waldegrave*, 2 Moore, 621; *Sprott* v. *Powell*, 3 Bing. 478.

(*o*) *Higgins* v. *Livingstone*, 4 Dow, 355.

(*p*) *Eaton* v. *Bell*, 5 B. & Ald. 341; *Parrott* v. *Eyre*, 10 Bing. 283; *Horsley* v. *Bell*, Amb. 770.

liability ex contractu of a mere agent acting in that character, circumstances do occasionally present themselves under which he may, even thus, incur responsibility. For instance, an action for money had and received lies to recover back money which has been obtained through compulsion, even where it has been received by an agent acting for his principal (*q*).

In *Smout* v. *Ilbery* (*r*), which has a direct bearing on the subject before us, the facts were somewhat peculiar: there the defendant was a married woman, to whom the plaintiff, a butcher, had been in the habit of supplying meat for the support of herself and her family. Meat had been thus supplied, not only whilst the defendant's husband was residing with her, but after he had left this country on a distant voyage, during which he died, and the question was, whether the defendant was liable for the price of such meat as was furnished to her *after* her husband's death, but before the news of his decease had come to hand; no evidence of fraud or suppression of facts, peculiarly within the defendant's knowledge, was given at the trial; and the Court held that the question just put was to be answered in the negative, reference being had to the recognised legal doctrines defining the liability of an agent who contracts as such (*s*). There is no doubt, the Court remarked, that an

(*q*) *Parker* v. *Bristol and Exeter R. C.*, 6 Exch. 702, 707; *Steele* v. *Williams*, 8 Exch. 625; *Snowdon* v. *Davis*, 1 Taunt. 359; Per Lord *Abinger*, C. B., *Atkee* v. *Backhouse*, 3 M. & W. 645.

Many additional cases are specified in Story on Agency, 4th edit. pp. 352 et seq., 379, in which an agent may incur personal liability.

(*r*) 10 M. & W. 1.

(*s*) The case of *Smout* v. *Ilbery*, supra, shows that an abstract right *may* exist without any legal means of enforcing it, for under the circumstances there appearing, no liability would attach to the estate of the husband (*Blades* v. *Free*, 9 B. & C. 167; *Companari* v. *Woodburn*, 24 L. J., C. P., 13), the agency of the wife.

agent guilty of a fraudulent misrepresentation of his authority, with an intention to deceive, would be personally responsible. And, as they further observed, there are two other classes of cases, in which an agent, who, without actual authority, makes a contract in the name of his principal, is personally liable, even where no proof of such fraudulent intention can be given; first, where the agent has no authority, and knows it, but, nevertheless, makes the contract as if he had it; here, on the plainest principles of justice, he is liable, because he induces the contractee to enter into the contract on what amounts to a misrepresentation of a fact peculiarly within his own knowledge. A second case, in which a mere agent will incur liability, may present itself, where the party contracting as agent bonâ fide believes that due authority is vested in him, whilst, in fact, he has no such authority—as where he acts under a forged warrant of attorney, which he believes to be genuine—under such circumstances, it seems clear that an action for damage, resulting from the mis-statement, would be maintainable against the agent, on the ground of the commission by him of a legal fraud.

It will of course be noticed, that the remarks just made apply to the liability ex delicto of an agent who has in some way misrepresented the existence or extent of his authority; and in cases of this kind, one or other of the fol-

having determined on his death. It must be remembered, however, that the situation of a married woman as a contracting party is sui generis. For an individual who contracts with an ordinary agent, contracts with one capable of contracting in his own name; whereas an individual contracting with a married woman knows that she is in general incapable of making any contract by which she is personally bound, and she therefore stands in the same situation as an agent who has expressly stipulated that he shall not, under any circumstances, be held personally liable, — a stipulation which it is of course quite competent to him to make: Judgm., 10 M. & W. 11, 12.

lowing ingredients will be found to be essential to the maintenance of an action against him, viz. that the agent has been guilty of some fraud, has made some statement which he knew to be false (*t*), or has stated as true what he did not know to be true, omitting, at the same time, to give such information to the other contracting party, as would have enabled him equally with himself to judge as to the sufficiency of the authority under which he (the agent) proposed to act.

Contract in writing by agent.

2. From the cases of *Jenkins* v. *Hutchinson* (*u*), *Downman* v. *Williams* (*x*), and *Mahony* v. *Kekulé* (*y*), we may clearly infer, that where a contract in writing has been entered into between parties, the character of either party to it, whether as principal or agent, and consequently his right to sue (*z*), or liability, upon the contract, will, if possible, have to be determined by reference to its express terms, the question being one of intention to be collected therefrom (*a*).

The first-mentioned of the cases above cited further shews, that a party who executes an instrument in the name of another, whose name he puts to the instrument, adding his own name only *as agent for* that other, cannot be treated as a party to that instrument, and be sued *upon it*, unless it be shewn that he was the *real* principal (*b*).

(*t*) See *Polhill* v. *Walter*, 3 B. & Ad. 114, cited post, Bk. III.; *Callow* v. *Jenkinson*, 6 Exch. 666.

(*u*) 13 Q. B. 744.

(*x*) 7 Q. B. 103. Acc. *Lewis* v. *Nicholson*, 21 L. J., Q. B., 311.

(*y*) 14 C. B. 390.

(*z*) A principal who permits his agent to describe himself as principal in a written contract may, in some cases, thus estop himself from suing upon it. See *Humble* v. *Hunter*, 12 Q. B. 310; *Bickerton* v. *Burrell*, 5 M. & S. 383; *Rayner* v. *Grote*, 15 M. & W. 359; *Schmaltz* v. *Avery*, 16 Q. B. 655; *Cox* v. *Hubbard*, 4 C. B. 317.

(*a*) See also *Wilson* v. *Zulueta*, 14 Q. B. 405, 414; *Pennell* v. *Alexander*, 3 E. & B. 283.

(*b*) Judgm., 13 Q. B. 752; *Carr* v. *Jackson*, 7 Exch. 382. In *Lewis* v. *Nicholson*, 21 L. J., Q. B., 311, *Crompton*, J., says—"It is not necessary

Where, on the other hand, a party signs *as principal*, we have already seen that he cannot *discharge himself* from liability by shewing that he was, in fact, an agent merely for some third party; though proof of such agency may be given with a view to *charging the real principal* (c).

By way of illustrating what has been just said, let us suppose that a written contract is duly signed by one on behalf of others as well as himself, the recent case of *Lucas* v. *Beale* (d) shews us that the individual signing must be regarded as an agent merely, and will not, therefore, be entitled to sue upon the contract; whilst from *Clay* v. *Southern* (e), we learn, that a party signing a memorandum of agreement in his own name *simpliciter*, will, in the absence of anything clearly inconsistent with such hypothesis, be regarded as a principal in the transaction. So, whether a contract be to *pay for another*, or whether it be *on behalf of another* to pay, may manifestly be a question of vital importance, in regard to the liability of the individual who has attached to it his signature (f).

to decide the sort of intermediate liability of an agent to be sued on the ground of a *misrepresentation* of authority, the representation *being treated as a contract by him;* but I think the remedy against an agent, who contracts as such without authority, may be either by an action *on the case* for a false representation of authority, or by an action on an *implied contract* for the existence of the authority which he professes to have." See also Story on Agency, 4th edit. s. 264, a.

(c) *Higgins* v. *Senior*, 8 M. & W. 834, cited ante, p. 514; Judgm., *Jones* v. *Littledale*, 6 Ad. & E. 490; *Magee* v. *Atkinson*, 2 M. & W. 440.

The question whether a signature attached to a written instrument is to be taken as a signature to the *whole* paper, was much considered in *Foster* v. *The Mentor Life Ass. Co.*, 3 E. & B. 48.

(d) 10 C. B. 739.

(e) 7 Exch. 717; *Higgins* v. *Senior*, 8 M. & W. 834; *Sowerby* v. *Butcher*, 2 C. & M. 368; *Spittle* v. *Lavender*, 2 B. & B. 452.

(f) See per Lord *Lyndhurst*, C.B., *Hall* v. *Ashurst*, 1 C. & M. 719.

Contract under seal by agent.

3. An agent who is required to execute a deed for his principal, should have express authority under seal for that purpose (*g*). When thus authorised, he may sign either in the name of his principal, or as agent for and on behalf of him (*h*). The solemn nature of a deed, however, excludes parol evidence to shew that one who has executed it as principal was, in fact, but an agent (*i*). The above rule, which exists at common law, is, however, modified by various statutory provisions, having reference to particular kinds of agency existing in connection with public companies.

From the preceding remarks will be collected the leading modifications imposed by the relation of principal and agent on the capacity to contract. We have seen, that, where the relation in question subsists, the principal is, in general, the proper party to sue or to be sued upon a contract; that a mere agent is, in many cases, debarred from appearing as plaintiff, and relieved from responsibility as defendant, in respect of a transaction wherein he has personally participated; that, in some rare cases, a party dealing with one who is ostensibly an agent, may find himself wholly without redress for the breach of a contract thus concluded. I shall now proceed very briefly to inquire as to the manner in which partners may contract, so as thereby to acquire rights or to incur liabilities as such, and whether under any, and if so, under what, circum-

(*g*) *Harrison* v. *Jackson*, 7 T. R. 207, 210; *Wilks* v. *Back*, 2 East, 142; *White* v. *Cuyler*, 6 T. R. 176; Judgm., *Hunter* v. *Parker*, 7 M. & W. 343.

(*h*) *Coombes's case*, 9 Rep. 76 b; *White* v. *Cuyler*, supra. See *Appleton* v. *Binks*, 5 East, 148.

(*i*) *Shack* v. *Anthony*, 1 M. & S. 573; *Berkeley* v. *Hardy*, 5 B. & C. 355; *Metcalfe* v. *Rycroft*, 6 M. & S. 75; *Hancock* v. *Hodgson*, 4 Bing. 269; *Bacon* v. *Dubarry*, 1 Lord Raym. 246. See *Gibson* v. *Winter*, 5 B. & Ad. 96.

stances, the existence of the relation of partner and co-partner may occasion an incapacity to contract.

Partnership is a contract founded on consent between two or more persons, by which they agree to employ their capital, labour, and skill in trade or business, with a view to a communion in profit and loss between them (*k*). Partnership —what it is.

In connection, however, with any definition which may be offered of the word "partnership," it will be found necessary carefully to distinguish between a partnership *inter sese* (which is more particularly aimed at in the explanation of the term above given) and a partnership *quoad third persons*. Traders become partners *between themselves* by a mutual participation of *profit and loss* (*l*); but *as to third persons*, they are partners if they share the *profits* of a concern (*m*); "for he who receives a share of the profits

(*k*) Story on Partnership, p. 2, and authorities there cited.

In *Waugh* v. *Carver*, 2 H. Bla. 235, the true definition of the term in question was discussed. To that case, with Mr. Smith's note thereto, (L. Cas., vol. 2, p. 503–4), the reader is referred for full information upon this subject.

(*l*) "In order to constitute a partnership it is not essential that the partners should equally share the profits and losses. It is sufficient if they are to share in the profits of the business after a deduction of the losses; or, in other words, that they should share in the nett profits according to their respective proportions. It is, therefore, competent for the partners, by their stipulations, to agree that the profits shall be divided; and if there be no profits, but a loss, that the loss shall be borne by one or more of the partners exclusively, and that the others shall, inter sese, be exempted therefrom:" Story on Partnership, p. 28.

(*m*) The cases in which a liability as partner exists in regard to third persons, are distributed by Dr. Story, in his Treatise on Partnership, p. 82, into five classes, as under:—

"1. Where, although there is no community of interest in the capital stock, yet the parties agree to have a community of interest or participation in the profit and loss of the business or adventure as principals, either indefinitely or in fixed proportions.

"2. Where there is, strictly speaking, no capital stock, but labour, skill, and industry are to be contributed by each in the business, as principals, and the profit and loss

receives a part of that fund upon which the creditors of the concern have a right to rely for payment, and is therefore to be made liable to losses, although he may have expressly stipulated for exemption from them" (*m*). "All the cases," it has been further said, "seem to agree that whatever be the private stipulations between the parties themselves, an agreement for a participation in the profits constitutes a partnership as to third persons; for it is but reasonable that one who stipulates for an interest in the profits should be held liable to those who supply the means of carrying on the trading concern out of which those profits are to arise" (*n*).

Now, when a partnership with a community in profit and loss has been constituted between A. and B., either partner becomes at common law, ipso facto, incapacitated from efficiently contracting with his co-partner in respect of any matter directly connected with the partnership; for a man cannot contract with himself (*o*); he cannot be at once plaintiff and defendant in an action (*p*); and it is a rule, that be-

thereof are to be shared in like manner.

"3. Where the profit is to be shared between the parties as principals, in like manner, but the loss, if any occurs beyond the profit, is to be borne exclusively by one party only. (See *Heyhoe* v. *Burge*, 9 C. B. 431.)

"4. Where the parties are not in reality partners, but hold themselves out, or at least are held out by the party, sought to be charged, as partners to third persons, who give credit to them accordingly.

"5. Where one of the parties is to receive an annuity out of the profits, or as a part thereof."

(*m*) Judgm., *Pott* v. *Eyton*, 3 C. B. 39; Per *Eyre*, C. J., *Waugh* v. *Carver*, 2 H. Bla. 246, 247; Per Lord *Eldon*, *Ex parte Langdale*, 18 Ves. 300.

(*n*) Per *Wilde*, C. J., *Barry* v. *Nisham*, 3 C. B. 655; *Heyhoe* v. *Burge*, 9 C. B. 431, and cases there cited.

(*o*) In illustration of this remark, see *Faulkner* v. *Lowe*, 2 Exch. 595.

(*p*) Per *Best*, C. J., 4 Bing. 151.

In Story on Partnership, pp. 321 et seq., 343, the remedies, inter sese, of partners at common law are well discussed, and many authorities bearing upon the subject are collected.

tween partners, whether they are so generally or for a particular transaction only, no account can be taken at law (*q*). One partner, therefore, cannot maintain an action in one of the superior Courts (*r*) against his co-partner for goods sold (*s*), work done (*t*), or money had and received (*u*) on account of the partnership. Neither can one partner recover on a bill of exchange drawn by him on and accepted by the firm of which he is a member (*v*). Nor can one mercantile firm maintain an action ex contractu against another firm, where the same person is a partner in both houses, and the right of action accrued during the period of his being such partner (*w*).

Where, however, a ground of defence, founded on the existence of a partnership between plaintiff and defendant, seems primâ facie to be available, great care is often requisite in determining whether the apparent partnership does in fact exist (*x*), in assigning the limits of a *particular* partnership (*y*), in distinguishing between a joint contract, or liability ex contractu, and a partnership (*z*). There

(*q*) Per *Abbott*, C. J., *Bovill* v. *Hammond*, 6 B. & C. 151. The action of *Account*, now almost obsolete, will, however, sometimes lie between partners.

(*r*) As to the jurisdiction of the County Court in cases of partnership, see 9 & 10 Vict. c. 95, s. 65; 13 & 14 Vict. c. 61, s. 1.

(*s*) *Harvey* v. *Kay*, 9 B. & C. 356.

(*t*) *Holmes* v. *Higgins*, 1 B. & C. 74; *Wilson* v. *Viscount Curzon*, 15 M. & W. 532; *Milburn* v. *Codd*, 7 B. & C. 419; *Goddard* v. *Hodges*, 1 Cr. & M. 33.

(*u*) *Bovill* v. *Hammond*, 6 B. & C. 149.

(*v*) *Neale* v. *Turton*, 4 Bing. 149; *Teague* v. *Hubbard*, 8 B. & C. 345. See *Fox* v. *Frith*, 10 M. & W. 131.

(*w*) *Bosanquet* v. *Wray*, 6 Taunt. 597; *Mainwaring* v. *Newman*, 2 B. & P. 120. See *Waters* v. *Towers*, 8 Exch. 401.

(*x*) See *Caldicott* v. *Griffiths*, 8 Exch. 898; *Reg.* v. *Wortley*, 21 L. J., M. C., 44; *Brown* v. *Tupscott*, 6 M. & W. 119.

(*y*) That is, a partnership in respect of one particular venture or transaction. See *Lucas* v. *Beach*, 1 M. & Gr. 417.

(*z*) *Batard* v. *Hawes*, 2 E. & B. 287; *Earl of Mountcashell* v. *Barber*, 14 C. B. 53; *Kemp* v. *Finden*, 12 M. & W. 421; *Edger* v. *Knapp*, 5

is, moreover, a large class of cases, separated sometimes by a rather fine line from those above specified, in which the existence of the relation of partnership between the litigating parties will be found, on examination, to be immaterial with reference to the matter sub judice.

Where, for instance, such matter is in no way connected or mixed up with the partnership affairs (*a*), or where a final balance has been ascertained and struck between partners, provided the settlement be one which is binding and conclusive upon them, an action lies for such balance at the suit of the party ascertained to be entitled to it (*b*). So where A. and B. entered into partnership to work a coal mine, and, the mine being worked out, they agreed to divide the partnership stock of materials, &c., each partaking one moiety thereof, according to a valuation to be made, and, after such valuation had been made, B. agreed to take the whole pursuant to that estimate, and accordingly entered into possession of it, A. was held to have an immediate right of action against B. for a moiety of the value of the partnership stock (*c*). It may be well also to add, that sometimes power is given by statute to one member of a partnership to sue a co-partner on behalf of the concern (*d*).

Observing, then, that the capacity to contract efficiently may, in certain cases, be affected by the existence of a partner-

M. & Gr. 753; *Toussaint* v. *Martinnant*, 2 T. R. 100; *Blackett* v. *Weir*, 5 B. & C. 387 (with which compare *Sadler* v. *Nixon*, 5 B. & Ad. 936; *Osborne* v. *Harper*, 5 East, 225).

(*a*) Story on Partnership, p. 320; *Cross* v. *Cheshire*, 7 Exch. 43.

(*b*) *Wray* v. *Milestone*, 5 M. & W. 217; *Foster* v. *Allanson*, 2 T. R. 472 (with which compare *Middleditch* v. *Ellis*, 2 Exch. 623); *Rackstraw* v. *Imber*, 2 Holt, N. P. C. 368.

See *Fromont* v. *Coupland*, 2 Bing. 170; *Carr* v. *Smith*, 5 Q. B. 128, 138.

(*c*) *Jackson* v. *Stopherd*, 2 Cr. & M. 361; *Coffee* v. *Brian*, 3 Bing. 54; *Wilson* v. *Cutting*, 10 Bing. 436. See *Lomas* v. *Bradshaw*, 9 C. B. 620; *Brown* v. *Tapscott*, 6 M. & W. 119.

(*d*) See as an instance, *Reddish* v. *Pinnock*, 10 Exch. 213.

ship between the contractor and contractee, it will be proper in the next place to inquire how far the relationship in question may modify the rights and liabilities of partners in regard to third persons. Now, any one member of an ordinary trading firm is, in contemplation of our common law, an accredited agent of the firm, so as to bind it by his act done, or assurance made, with reference to and in the ordinary course of business transacted by it(*e*), in the absence of collusion between himself and the other contracting party(*f*). One partner, by virtue of that relation, is constituted a *general agent*(*g*) for the firm, as to all matters within the scope of the partnership dealings, and has communicated to him all authority necessary for carrying on the partnership, and such as is usually exercised by a partner in that business in which he is engaged. Any restriction, which by agreement amongst the partners is attempted to be imposed upon the authority which one partner possesses as a general agent for the others and for the firm, is operative only between the partners themselves, and does not limit the authority in question as to third persons, who acquire rights by its exercise, unless they know that such restriction has been made(*h*).

Liability of firm quoad third persons.

Subject to the foregoing remarks, it is indeed true, as a general rule, that "where a partnership name is pledged, the partnership, of whomsoever it may consist, and whether the partners are named or not, and whether they are known or secret partners, will be bound"(*i*), each individual mem-

(*e*) Per *Abbott*, C. J., *Sandilands v. Marsh*, 2 B. & Ald. 678; *Marsh* v. *Keating*, 2 Cl. & F. 250; *Blair* v. *Bromley*, 5 Hare, 542; *S. C.*, 2 Phill. 354; with which cases compare *Bishop* v. *Countess of Jersey*, 23 L. J., Chanc., 483.

(*f*) Per *Bayley*, J., *Vere* v. *Ashby*, 10 B. & C. 296; *Lewis* v. *Reilly*, 1 Q. B. 349.

(*g*) Ante, p. 536.

(*h*) Judgm., *Hawken* v. *Bourne*, 8 M. & W. 710; Per *Le Blanc*, J., *Hudson* v. *Robinson*, 4 M. & S. 482.

(*i*) Judgm., *Wintle* v. *Crowther*, 1 Cr. & J. 318; *De Mautort* v. *Saun-*

ber of the firm being answerable *in solido* for the whole amount of the partnership debts, without reference to the proportion of his interest as between himself and his co-partners (*k*). Even a nominal partner, i. e. one who lends his name to a firm without participating in its profits, is generally responsible to third persons as a partner; for he may induce them to give that credit to the firm which otherwise it would not receive, nor perhaps deserve (*l*). Assuming as true the above elementary propositions, without citing additional authorities in support of them, let us inquire how they may assist towards determining the mode in which a trading partnership may contract (*m*).

Agency of partner of trading firm —its nature.

The difference which exists between the kind of agency implied by law from the relation of partnership between individuals, and that which has (in many cases) to be proven in order to fix joint contractors (not being trading partners) with liability, may be illustrated by reference to the responsibility of a member of a club.

In the case, then, of a club, a committee is usually chosen out of the entire body of the members, and is invested with certain powers, more or less clearly defined, for carrying out the objects of the institution. The general liability accordingly of any individual member of the club for goods ordered, or on contracts entered into, by a fellow-member will depend upon the question—whether such latter par was or was not an agent duly and sufficiently authorised to

ders, 1 B. & Ad. 398, 401; *Bonfield* v. *Smith*, 12 M. & W. 405; *Ex parte Hamper*, 17 Ves. 403; *Drake* v. *Beckham*, 11 M. & W. 315; *S. C.*, 9 M. & W. 79; 2 Ho. L. Cas. 579.

(*k*) Kent's Com., 7th ed., vol. 3, p. 31.

(*l*) Id., ibid.; *Guidon* v. *Robson*, 2 Camp. 302.

The cases with reference to the liability of a nominal partner are cited in Broom's Pract., vol. 1, p. 399. As to the remedies by him, see Id., p. 246.

(*m*) An excellent epitome of the law of partnership is given in the 43rd Lect. of Chancellor Kent's Commentaries.

pledge the credit of his fellow-members, in such manner as he has assumed to do. Further, the members of the club, or some portion of them, may be rendered jointly liable by shewing that they have authorised the contract declared upon either through the medium of the committee, or of some accredited officer of the club, or by their own direct act, without the intervention of any other party, ex. gr., by having attended and voted on the committee or at a general meeting of the club. Usually, indeed, associations of the kind alluded to agree among themselves upon certain written rules and regulations for their guidance, and from such rules the committee or managing body derive their right to pledge the individual credit of the members in certain cases, the right to bind the subscribers being restrained within the limits thus defined, and any contract entered into by the committee not falling within such limits being invalid as regards those who are not directly parties to it(*n*).

In the class of cases, then, just adverted to, the liability of the party charged upon a contract will usually depend, as pointed out, upon express proof of agency; and the same remark applies to an action for goods sold and delivered brought against a member of the provisional committee of a railway company; where it will be necessary for the plaintiff, by reference to the law of principal and agent, in such manner as was explained at p. 538, to connect the defendant with the order given for the goods.

The liability, on the other hand, of a trading co-partnership in respect of a contract entered into by one of its

(*n*) *Earl of Mountcashell* v. *Barber*, 14 C. B. 53; *Todd* v. *Emly*, 8 M. & W. 505; *Flemyng* v. *Hector*, 2 M & W. 172, and cases there cited; *Tyrrell* v. *Woolley*, 2 Scott N. R. 171; *Heraud* v. *Leaf*, 5 C. B. 157; *Rennie* v. *Clarke*, 5 Exch. 292.

members, must be determined by somewhat different considerations.

Where a contract is entered into by one member of a firm, *expressly in its name* or *on its behalf*, the liability or non-liability of the firm will mainly depend upon this inquiry—Was the particular contract declared upon within the general scope of the partnership dealings?—if so, the firm will be liable upon the contract.

A partner may, for example, bind his co-partners by buying, selling, or pledging goods, by paying, receiving, or borrowing money, or by doing other acts incident or appropriate to the particular trade or business, and in accordance with its common course and usage(*o*). So, an ordinary trading firm will be bound by a bill of exchange or promissory note, accepted, made, or indorsed in the regular way of business, by one partner using the name of the firm, or signing for self and partners(*p*).

But, although there is communicated to one partner in a firm, simply by the creation of the relation of partners and as incident thereto, all the authority necessary for carrying on the partnership in its ordinary course, and all such authority as is usually exercised by partners in the particular sort of trade in question,—to allow one partner to bind another by contracts out of the ordinary scope of the partnership dealings, even though they be reasonable acts towards effecting the partnership purposes, would be attended with great danger(*q*).

(*o*) Story on Partnership, s. 102, and cases there cited; Story on Agency, s. 124, cited and adopted in *The Bank of Australasia* v. *Breillat*, 6 Moore P. C. C. 193.

(*p*) Id. ibid.

See *Ex parte Buckley*, 14 M. & W. 469; *Maclae* v. *Sutherland*, 3 E. & B. 1; *Healey* v. *Story*, 3 Exch. 3; *Thompson* v. *Universal Salvage Co.* 1 Exch. 694; *Jenkins* v. *Morris*, 16 M. & W. 877; *Mason* v. *Rumsey*, 1 Camp. 384, and cases ante, p. 463.

(*q*) Judgm., *Brettel* v. *Williams*, 4 Exch. 630 (citing *Hawtayne* v. *Bourne*, ante, p. 542, n. (*d*)).

The implied right, therefore, of one partner to bind the firm by bill of exchange or promissory note, is confined to trading partnerships. There is, for instance, no custom or usage that attornies should be parties to negotiable instruments; nor is it necessary, for the purposes of their business, that they should be so (*r*). Neither will a guarantee given by an attorney be binding on his co-partner in the absence of proof of knowledge or privity on the part of the latter, and there being no evidence to shew that the security was given in pursuance of the ordinary practice of the parties (*s*). So, although it is part of an attorney's business to prepare conveyances, to examine titles, and so forth, he is not, quà attorney, a *scrivener* (*t*); nor is he impliedly authorised by his co-partners to receive money indefinitely from a client, with a view to laying it out upon proper security when found (*u*). It is, however, incidental to the business of an attorney to receive money for the purpose of laying it out upon a particular mortgage; and in this latter case a firm might be liable for the receipt of money by one of its members (*x*). A partner cannot bind the firm to which he belongs by deed, unless he has express authority by deed for that purpose (*y*). Nor does it seem that a sub-

(*r*) *Hedley* v. *Bainbridge*, 3 Q. B. 316, 321; *Levy* v. *Pyne*, Carth. 453.

(*s*) *Hasleham* v. *Young*, 5 Q. B. 833. See *Brettel* v. *Williams*, 4 Exch. 623; *Bishop* v. *Countess of Jersey*, cited ante, p. 559 (*c*).

(*t*) A scrivener is a person who receives money to lay out upon security, and to hold in his hands until an opportunity offers for laying it out: per Lord *Campbell*, C. J., 2 E. & B. 66.

(*u*) *Harman* v. *Johnson*, 2 E. & B. 61. See *Sims* v. *Brutton*, 5 Exch. 802.

(*x*) *Harman* v. *Johnson*, supra.

(*y*) *Elliot* v. *Davis*, 2 B. & P. 338. Judgment, *Bank of England* v. *Anderson*, 3 Bing. N. C. 658; *Harrison* v. *Jackson*, 7 T. R. 207; *Horsley* v. *Rush*, cited Id. 209; *Hall* v. *Bainbridge*, 1 M. & Gr. 42; *Steiglitz* v. *Egginton*, Holt N. P. C. 141.

sequent ratification of the execution of the deed would suffice to render it effective(*z*). Power is, however, usually given by statute, charter, or otherwise, to certain specified officers of a public company to execute deeds on its behalf.

Again, where a contract has been made by one member of a partnership with a stranger, difficulty sometimes occurs in determining as to the true character of the contractee(*a*); thus, if an account be opened at a banker's by one of two partners in his own name, that fact, however strong, would not be conclusive to shew that the account was opened on his own individual behalf; but the banker might give evidence, *per contra*, to prove that the account was really with the firm, and that the individual opening the account acted in so doing as their agent(*b*).

So, if an application for a loan be made generally to a partner in a bank, the borrower thereby entitles the party so applied to, on making the advance, to hold him answerable in either of his (the lender's) capacities, of a partner or of a private individual, according as it may be shewn in which character he made the advance(*c*).

(*z*) See *Hunter* v. *Parker*, 7 M. & W. 322; *Ball* v. *Dunsterville*, 4 T. R. 313; *Hawkshaw* v. *Parkins*, 2 Swanst. 544; *Bowker* v. *Burdekin*, 11 M. & W. 128.

(*a*) *Beckham* v. *Drake*, 11 M. & W. 315, is a leading authority, to shew that an action *may* be maintainable against a firm on a *written* agreement signed by some only of its members (ante, p. 553).

(*b*) *Cooke* v. *Seeley*, 2 Exch. 746; *Sims* v. *Bond*, 5 B. & Ad. 389, 393; *Sims* v. *Brittain*, 4 B. & Ad. 375; and *Ireland* v. *Thompson*, 4 C. B. 149, (which are cited and distinguished in *Walshe* v. *Provan*, 8 Exch. 843); *Driver* v. *Burton*, 21 L. J., Q. B., 157.

See *Brownrigg* v. *Rae*, 5 Exch. 489; *Lucas* v. *De La Cour*, 1 M. & Sel. 249; *Cox* v. *Hubbard*, 4 C. B. 317; *Garrett* v. *Handley*, 3 B. & C 462; *S. C.*, 4 B. & C. 664; *Arden* v *Tucker*, 4 B. & Ad. 815; *Skinner* v *Stocks*, 4 B. & Ald. 437; *Bawden* v. *Howell*, 4 Scott N. R. 331; *Brandon* v. *Hubbard*, 2 B. & B. 11; *Boswell* v. *Smith*, 6 Car. & P. 60; *Story* v. *Richardson*, 6 B. N. C. 123.

(*c*) See, per *Bayley*, B., *Alexander* v. *Barker*, 2 Cr. & J. 138.

Where, moreover, it is sought to charge several persons as partners upon a contract, ostensibly entered into by one co-partner only, it may be necessary, in order to fix the partnership with liability, to look to the terms of any agreement, written or oral (*d*), subsisting between the parties charged, with a view to shewing that there was a joint authority given for entering into the contract. A., B., and C. verbally agreed that they would bring out and be jointly interested in a periodical publication. A. was to be the publisher, and to make and receive general payments; B. to be the editor; and C. the printer: and, after payment of all expenses, they were to share the profits of the work equally. C. was to furnish the paper and charge it to the account at cost price. It was held, upon these facts, that the plaintiff, who had delivered paper to C. for the purpose of the publication, could not recover its price as against A., B., and C. jointly. "The question," said *Parke*, B., "is, did the other defendants authorise C. to purchase the paper on their account, or on his own? It appears to me, on the true construction of the contract, that the latter was the case" (*e*).

From the brief remarks which have preceded, we may collect that the *mode of contracting*, as well as the *capacity to contract*, may be materially affected by the relation of partnership existing as between some or all of the contracting parties; for, by reason of this relationship, important rights may be conferred, or liabilities may be imposed, on parties who are not ostensibly either contractors or contractees. In order fully to carry out this inquiry, a minute examination (wholly incompatible with the plan of this work) of the remedies by and against partners would

(*d*) See *Heraud* v. *Leaf*, 5 C. B. 157. (*e*) *Wilson* v. *Whitehead*, 10 M. & W. 503.

be requisite. The subjoined remarks may, however, throw some additional light upon the subject before us, or, at all events, assist the student in pursuing it.

Continuance of liability as partner.

The rights and liabilities in regard to third persons of an individual, *quà* partner, on a contract, must obviously, in many cases, depend upon the answer to be given to this question—Was the particular contract entered into during the continuance of his participation in the profits of the partnership? The liability of a partner as such *commences* at the date of his admission into the firm; so that he will not, in general, be liable on a contract effected prior thereto (*f*). His liability *ceases* on the dissolution of the firm, or on his retirement from it, accompanied by due notice thereof (*g*), or (it seems) by proof of the creditor's knowledge of the fact (*h*). The retiring partner will still, however, remain liable in respect of previous engagements, unless the creditor who seeks to charge him has ever, expressly or impliedly, agreed to the substitution of the credit of the new firm for that of the old; and the onus of proving such an agreement, or of shewing that it must necessarily be inferred from the knowledge and conduct of the creditor, lies on the parties originally liable (*i*).

(*f*) See *Wilsford* v. *Wood*, 1 Esp. 183; *Beale* v. *Moulds*, 10 Q. B. 976; *Battley* v. *Lewis*, 1 M. & Gr. 155; *Sherriff* v. *Wilks*, 1 East, 48; *Wilson* v. *Lewis*, 2 M. & Gr. 197; Per *Bayley*, J., *Vere* v. *Ashby*, 10 B. & C. 297.

(*g*) "A retiring partner omitting to inform his customers of the *fact*, in the usual mode, that the continuing partners were no longer authorised to act as his agents, is bound by all contracts made by them with third persons on the faith of their being so authorised:" Judgment, *Freeman* v. *Cooke*, 2 Exch. 663-4.

(*h*) *Hart* v. *Alexander*, 2 M. & W. 484; *Newsome* v. *Coles*, 2 Camp. 617; *Parkins* v. *Carruthers*, 3 Esp. 248; *Graham* v. *Hope*, Peake N. P. C. 154.

(*i*) *Hart* v. *Alexander*, supra; *Dobbin* v. *Foster*, 1 C. & K. 323; *Kirwan* v. *Kirwan*, 2 C. & M. 617; *Thompson* v. *Percival*, 5 B. & Ad.

If, therefore, a banking firm makes payments professedly on account of a customer without his authority, and those payments are entered to the debit of the customer in the books of the firm, parties who afterwards become partners in that firm are not to be considered as agreeing to impose upon themselves a liability for anything more than that sum which by the books themselves, which are handed over to the new firm, appears to be due to the customer. And, in order to render the new firm liable for the amounts which do not so appear in the books, it will be necessary to shew that the old firm have ceased to be liable, and are discharged, by proof of an agreement between the old firm, the new firm, and the customer, that the new firm is to be considered as substituted, as the debtors, in lieu of the old, for the amount sought to be recovered (*k*).

The liability of a dormant, as of an active, partner will cease on his retirement from the firm, except quoad such persons as, at the time of contracting, knew him to be a partner. To these parties notice of withdrawal should be given, though none others are entitled to it (*l*).

The above remarks point to the manner in which the capacity to contract—ex. gr. to bind or benefit others, whose names do not expressly appear therein, by a contract—may,

925; *Lyth* v. *Ault*, 7 Exch. 669, (which shews that the acceptance by a creditor of the sole and separate liability of one of several joint debtors is a good consideration for an agreement to discharge all the other debtors from liability; ante, p. 323); *Thomas* v. *Shillibeer*, 1 M. & W. 124; *Bedford* v. *Deakin*, 2 B. & Ald. 210.

(*k*) *Craufurd* v. *Cocks*, 6 Exch. 287, 291.

(*l*) Per *Patteson*, J., *Heath* v. *Sansom*, 4 B. & Ad. 177; *Evans* v. *Drummond*, 4 Esp. 89; *Carter* v. *Whalley*, 1 B. & Ad. 11; *Farrar* v. *Deflinne*, 1 C. & K. 580.

in ordinary mercantile transactions, be affected by the relation of partnership; for we have seen that a partner, in many cases, may bind his co-partners, or so contract as to bind himself only, and not his co-partners (*m*). With reference to this part of the subject, I will merely add, that, at law, as well the remedy available to, as the liability (*n*) enforceable against, a partner in a trading firm passes or attaches on his death to his surviving co-partners; the rule here applicable being, that *the remedy survives, but not the right;* for *jus accrescendi inter mercatores, pro beneficio commercii, locum non habet;*—upon the dissolution of a mercantile or manufacturing (*o*) partnership by death, the property and effects thereof do not belong exclusively to the survivors, but are to be distributed between them and the representatives of the deceased, in the same manner as they would have been upon a voluntary dissolution inter vivos (*p*).

Contracts by corporations.

A *corporation* aggregate must in general contract by deed, and cannot bind itself by parol (*q*).

This is a rule extending to a wide and important class of cases, the principle on which it rests being, that a corporate body has no mode of indicating its consent to an act done, save by the affixing of its common seal to some document,

(*m*) Per *Maule*, J., *Holcroft* v. *Hoggins*, 2 C. B. 492.

(*n*) See, per Lord *Holt*, *Hyat* v. *Hare*, Comb. 382, cited 2 T. R. 479.

(*o*) *Buckley* v. *Barber*, 6 Exch. 164, with which compare *Crossfield* v. *Such*, 8 Exch. 825. This latter case shews that the right of survivorship holds at common law, save where a case falls within the principle of the exception introduced by the Lex Mercatoria.

(*p*) Story on Partnership, s. 342, adopted Judgm., 6 Exch. 180.

(*q*) Many examples, shewing the application of this rule, are collected in Grant, Corp. pp. 55—60, to which the reader is referred.

which will thus be evidence as well of the act done as of the assent to it of the body corporate (*r*). In no other way can the concurrence of the entire body corporate in the particular act be authenticated. It could not, for instance, be evidenced by the resolution of a meeting composed of members of the corporation, however numerously attended (*s*).

As illustrating the rule above stated, the following cases may be mentioned, though, inasmuch as the maxim *exceptio probat regulam* forcibly applies in regard to the class of decisions under notice, cases which are exceptions to, as well as those which support, the general rule, should, in regard to its true scope and operation, be alike carefully consulted. In *Arnold* v. *The Mayor of Poole* (*t*), it was held, that an attorney who had been employed by the mayor and town council of Poole to conduct suits on their behalf, but had not been appointed under seal, could not recover his bill of costs against the corporation. In *Diggle* v. *The London & Blackwall Railway Company* (*u*), the facts were these:—The plaintiff, who was a railway con-

(*r*) Upon this point, Blackstone tells us (1 Com. p. 475), that, after a corporation has been formed and named, it acquires certain "capacities and incapacities, some of which are necessarily and inseparably incident to it;" amongst these is *the having a common seal.* "For a corporation, being an invisible body, cannot manifest its intention by any personal act or oral discourse; *it therefore acts and speaks only by its common seal.* For though the particular members may express their private consents to any act by words or signing their names, yet this does not bind the corporation —it is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole."

(*s*) Judgm., *Mayor of Ludlow* v. *Charlton*, 6 M. & W. 823.

(*t*) 4 M. & Gr. 860; *Paine* v. *The Strand Union*, 8 Q. B. 326; *Lamprell* v. *Billericay Union*, 3 Exch. 283, 306. And see cases cited in the ensuing notes.

(*u*) 5 Exch. 442.

tractor, entered into an agreement, not under seal, with the defendants, to do certain work upon their railway; having done some of the work in pursuance of the agreement, he was then ordered to discontinue it by the company; and it was held that he could not recover for any portion of the work so done; the simple answer to the action being, that a corporation cannot contract unless by their common seal.

Exceptions to rule.

The rule in question, however, that a corporation can only act or speak by its common seal, though true in theory, was found intolerable in practice. The very act, it has been said, of affixing the seal, of lifting the hand, or opening the mouth, could only be done by some individual member, theoretically quite distinct from the body politic, or by some agent. The management of the corporate property, the daily sustentation of the members, the performance of the very duties for which the corporation was created, required incessantly that acts should be done sometimes of daily recurrence, sometimes entirely unforeseen, yet admitting of no delay; sometimes of small importance, or relating to property of little value. The same cause also required that contracts to a small amount should often be entered into. In all these cases, to require the affixing of the common seal was impossible, and therefore, from time to time, as the exigencies of the case have required, exceptions have been admitted to the rule (*x*); the decisions as to which, as remarked by Lord *Denman*, C. J. (*y*), furnish the principle on which they have been established, and shew that it is "*convenience amounting almost to necessity.*" The exceptions here adverted to may be arranged as under :—

(*x*) Judgm., *Beverley* v. *The Lincoln Gas Light and Coke Co.*, 6 Ad. & E. 844; Per *Parke*, B., *Cope* v. *Thames Haven Dock and R. Co.*, 3 Exch. 844; Grant Corp. p. 60.

(*y*) *Church* v. *The Imperial Gas Light and Coke Co.*, 6 Ad. & E. 861.

1. When the acts to be done are such as the corporation, by its very constitution, is appointed to do, or such as are necessarily incidental to its business; as in the case of a trading corporation, whose duty requires that it should draw bills of exchange (*z*); or of a railway company, whose business it is to issue tickets to passengers and generally for traffic upon the line (*a*). The exception in question extends, indeed, as remarked by *Wightman*, J., in *Clarke* v. *The Guardians of the Cuckfield Union* (*b*), to cases "where the making of a certain description of contracts is necessary and incidental to the purposes for which the corporation was created." "Wherever to hold the rule applicable would occasion very great inconvenience, or tend *to defeat the very object for which the corporation* was created, the exception has prevailed" (*c*).

As an example of this exception to the general rule, the case of *The Copper Miners Company* v. *Fox* (*d*) may be cited; that was an action of assumpsit, by a corporation, on

(*z*) Per *Alderson*, B., *Diggle* v. *London and Blackwall R. Co.*, 5 Exch. 450; Judgm., *Church* v. *The Imperial Gas Light and Coke Co.*, 6 Ad. & E. 861; *Dunston* v. *The Imperial Gas Light and Coke Co.*, 3 B. & Ad. 125.

(*a*) *Cox* v. *Midland Counties R. Co.*, 3 Exch. 268. As to contracts by railway companies for the conveyance of passengers and goods, see further, post, Book III.

(*b*) 21 L. J., Q. B., 349, where the learned Judge, whose words are above cited, says, "In most of the earlier of the modern cases, the corporations have been plaintiffs; but those cases were decided upon grounds which would be equally applicable had the actions been against them." See *The London Gas Light and Coke Co.* v. *Nicholls*, 2 Car. & P. 365; *The Mayor &c. of Stafford* v. *Till*, 4 Bing. 75; *The East London Waterworks Co.* v. *Bailey*, Id. 283; *The Mayor of Ludlow* v. *Charlton*, 6 M. & W. 815; *Mayor of Carmarthen* v. *Lewis*, 6 Car. & P. 608; *City of London Gas Light and Coke Co.* v. *Nicholls*, 2 Car. & P. 365.

(*c*) Judgm., 6 Ad. & E. 861.

(*d*) 16 Q. B. 229. See also *Paine* v. *Guardians of the Strand Union*, 8 Q. B. 326; *Lamprell* v. *Billericay Union*, 3 Exch. 283.

a contract by parol, for the supply of iron rails to the defendant, and, under non assumpsit, the action was held not sustainable, upon proof that the company's charter incorporated them *for the purpose of working copper mines and selling copper ore,* but contained nothing which authorised the company to deal in *iron.* "Had the subject-matter of this contract been copper," observed the Court of Queen's Bench, "or if it had been shewn in any way to be incidental or ancillary to carrying on the business of copper miners, the contract would have been binding, although not under seal; for, where a trading company is created by charter, while acting within the scope of the charter, it may enter into the commercial contracts usual in such a business in the usual manner. But the iron rails, the subject-matter of this contract, were not shewn to have any connection with the business of copper miners." The distinction here taken by the Court seems precisely to illustrate the scope and meaning of the first common law exception to the general rule respecting contracts by bodies corporate above adverted to.

The second established exception to the general rule applies to acts of *frequent recurrence,* of *immediate urgency,* or altogether *trivial* in their nature, so that the doing them in the usual way, and with the solemn authentication of the corporate seal, would be *inconvenient or absurd* (*e*). Hence a corporation *which has a head* (*f*) may give a

(*e*) Per *Alderson*, B., 5 Exch. 450; Judgm., 6 Ad. & E. 861; Per Lord *Denman*, C. J., *Hall* v. *Mayor &c. of Swansea*, 5 Q. B. 546; Judgm., 4 M. & Gr. 895; *De Grave* v. *Mayor &c. of Monmouth*, 4 Car. & P. 111; *Denton* v. *East Anglian R. Co.* 3 C. & K. 16.

(*f*) Whether the above exception applies to a corporation *without a head*, has not yet been determined: per *Parke*, B., *Cope* v. *Thames Haven Dock and R. Co.*, 3 Exch. 844.

personal command, and, by parol, do sundry small acts. It may, thus, retain a servant(*g*), or authorise another to make a distress, or the like, these being acts which require to be done for the ordinary convenience of the body corporate, and which the head of the corporation is delegated by its other members to perform.

Both the foregoing exceptions to the general rule, it will be observed, originated in *necessity*, or in *convenience almost amounting to necessity*. The third exception to be noticed, which is not perhaps so well established, or, at all events, so well defined as the preceding, will be found to require for its support this special ingredient, viz. the adoption of the particular contract in question, and the enjoyment of the benefits resulting from it, by the corporation or by the other contracting party (*h*).

Thus it has been held, that assumpsit for use and occupation will lie at suit of a corporation where the tenant has held premises under them, and paid rent (*i*). It has

(*g*) Judgm., *Arnold* v. *Mayor of Poole*, 4 M. & Gr. 895, and cases there cited; *Smith* v. *Cartwright*, 6 Exch. 927, 939; *Cox* v. *Midland Counties R. Co.*, 3 Exch. 268; Judgm., *Gibson* v. *E. India Co.*, 5 Bing. N. C. 270, 271.

A covenant may, in some cases, be discharged by the act of the covenantee, without deed; and a corporation may, in like manner, by their acts or the acts of their agent, discharge the covenantee without any writing under seal: *Cort* v. *Amberyate &c. R. Co.*, 17 Q. B. 127. See *Brymer* v. *Thames Haven Dock and R. Co.*, 2 Exch. 549.

(*h*) In *Diggle* v. *The London and Blackwall R. Co.*, 5 Exch. 451, however, *Rolfe*, B., refers cases such as are above adverted to, to the principle of *necessity*, which "really embraces all the excepted cases,—that is, matters too trivial or of too frequent occurrence, as in the case of trading corporations drawing bills, without which they could not carry on their trade, &c. With these exceptions, the old law remains as it did in the time of Hen. 8, and the earlier times before it."

(*i*) *Mayor of Stafford* v. *Till*, 4 Bing. 75; *Mayor of Carmarthen* v. *Lewis*, 6 Car. & P. 608; *Dean &c. of Rochester* v. *Pierce*, 1 Camp. 466; *Mayor of London* v. *Hunt*, 3 Lev. 37.

been held, also, that if a contract with a corporation is executed by them, if the persons who are parties to the contract with the corporation have received the benefit of the consideration moving from the corporation, these last-mentioned parties are bound by the contract, and liable to be sued thereon by the corporation (*k*).

Further, where the guardians of a union verbally directed their officer to have gates made for the union workhouse, and the plaintiff, in pursuance of orders from the officer, furnished the gates, which were erected, the jury having found for the plaintiff, the Court of Queen's Bench refused to disturb the verdict, inasmuch as the work, after it had been done and completed, was adopted by the defendants for purposes connected with the corporation (*l*).

The judgment in *Clarke* v. *The Cuckfield Union* (*m*) is important, with reference to the class of cases now under notice. There the action was in debt for goods sold and delivered, and for work and labour, the claim being in respect of water-closets put up by the plaintiff at the union workhouse, by the direction and with the approbation of the defendants, at a regularly constituted meeting of the Board of Guardians. The broad question for judicial decision was this, whether, assuming the articles supplied to have been such as were proper and needful for the work-

(*k*) Judgm., *Fishmongers' Co.* v. *Robertson*, 5 M. & Gr. 192 (where the principle is extended to *executory* contracts with a corporation; as to which see Judgm., *Copper Miners Co.* v. *Fox*, 16 Q. B. 237–8); *Reg.* v. *Mayor of Thetford*, 2 Ld. Raym. 848; *Barber Surgeons of London* v. *Pelson*, 2 Lev. 252; *East London Waterworks Co.* v. *Bailey*, 4 Bing. 287.

(*l*) *Sanders* v. *The St. Neot's Union*, 8 Q. B. 810; with which compare *Paine* v. *The Strand Union*, Id. 326; *Lamprell* v. *Billericay Union*, 3 Exch. 283, 307, and cases cited post.

(*m*) 21 L. J., Q. B., 349.

house; assuming, also, that the defendants ordered them, at a meeting of the board, to be furnished by the plaintiff, and afterwards approved and kept them, they were exonerated from liability, on the ground that no contract under seal for the supply in question had been entered into? *Wightman*, J., after adverting to the general rule applicable to the contracts of a body corporate, and the exceptions to it, held that the defendants could not thus repel the claim against them. "I am disposed to think," said the learned Judge, "that wherever the purposes for which a corporation is created render it necessary that work should be done, or goods supplied, to carry such purposes into effect, as in the case of the guardians of a poor-law union, and orders are given at a board regularly constituted, and having general authority to make contracts for work or goods necessary for the purposes for which the corporation was created, and the work is done, or goods supplied, and accepted by the corporation, and the whole consideration for payment executed; the corporation cannot keep the goods, or the benefit, and refuse to pay, on the ground that though the members of the corporation who ordered the goods or work were competent to make a contract and bind the rest, the formality of a deed or of affixing the seal were wanting, and then say, 'No action lies; we are not competent to make a parol contract, and we avail ourselves of our own disability.'"

It is obvious that the general rule by which a corporation is incapacitated from contracting, save under its common seal, may sometimes operate very harshly, ex. gr towards one who, having contracted fairly and bonâ fide with a corporation, and having performed his contract, is, on demanding the stipulated remuneration, met by the objec-

tion that the contract in question was parol merely; hence the qualification of the rule laid down by *Wightman*, J., in *Clarke* v. *The Cuckfield Union*, seems reasonable, and whether the correctness of the decision, there arrived at, be or be not admitted, there is authority in support of this proposition—that where a corporation has acted as upon an executed contract, it is to be presumed against them that everything necessary to make the contract *mutually* binding has been done—that is to say, a presumption has in various cases been raised as against a corporate body from its acts to this effect—that it has contracted in such a manner as to bind itself (*n*).

The above-mentioned qualification of the general rule is distinctly insisted upon by Lord *Campbell* in *Lowe* v. *The London and North Western Railway Company* (*o*), where it was applied to render a corporation liable in assumpsit for the use and occupation of land entered upon by permission of the owner, but not held by instrument of demise under seal; and the decision in this case was approved of by the Court of Exchequer in *Pauling* v. *The London and North Western Railway Company* (*p*), where the facts were as follow: An agent of the company, who were defendants in the action, agreed by parol with the plaintiff to purchase of him

(*n*) *Doe* d. *Pennington* v. *Taniére*, 12 Q. B. 998; with which, however, compare *Finlay* v. *The Bristol and Exeter R. Co.*, 7 Exch. 409, where it was sought to make the defendants liable on an implied contract for use and occupation of premises for a portion of a year during which they had *not* occupied; and *Parke*, B., observed, "No case has gone the length of saying that a corporation may bind itself by a contract not under seal, which does not range within either the small services excepted by the common law, or contracts authorised by parliamentary charter."

(*o*) 21 L. J., Q. B., 361. See *Giles* v. *The Taff Vale R. Co.*, 2 E. & B. 822; *S. C.*, 23 L. J., Q. B., 43, and cases there cited.

(*p*) 8 Exch. 867.

a quantity of railway sleepers upon certain terms. The sleepers were received and used by the company, who afterwards objected to pay for them, on the ground that no contract had been made obligatory on them within the 97th section of the Companies Clauses Consolidation Act (8 & 9 Vict. c. 16); the Judge having ruled that there was evidence for the jury of a contract with the company, the Court in banc affirmed this ruling, upon the ground, that where an incorporated company has had the benefit of a bargain made by its agent, it will be a reasonable inference for a jury that the bargain in question was duly and effectually entered into (*q*).

The case just cited illustrates the nature of a new class of exceptions, which, in modern times, has sprung up to the general rule, that a corporate body must contract under seal. Corporations are now frequently established by charter, letters patent, or Act of Parliament, for the purpose of carrying on trading speculations, to which the drawing of bills or the making of particular kinds of contracts is essential. In such cases, power is usually conferred on certain of the corporate officers, designated by the crown or legislature, to enter into contracts, such as alluded to, on behalf of all the members of the corporation otherwise than under seal: and here difficulty can scarcely arise respecting the efficacy of contracts which profess to be thus made, unless it be from the ambiguous wording of the statute, charter, deed of settlement, or other instrument, under which the corporation in question has been constituted.

When governed by express statutory provisions, the rule applicable is, that a body corporate must contract either

(*q*) See also *Smith* v. *The Hull Glass Co.*, 11 C. B. 897, and 8 C. B. 668; *The Northampton Gas Light Co.* v. *Parnell*, (C. P.) 19 Jur. 211.

under seal or in such manner as is sanctioned thereby (*r*).

Further, it is obvious, that joint stock companies, regulated by statute and by deed of settlement duly registered, are not to be treated, in all respects, as ordinary trading partnerships; such companies are only bound by contracts made by the directors or other officers *within the scope of their authority* (*s*); any contract or agreement entered into ultra vires, however beneficial for the shareholders may appear its tendency, will (as a general rule) be wholly void (*t*). To this subject, which is one of great and increasing importance to the community, a bare allusion must here suffice.

Effect of bankruptcy on the capacity to contract.

A very few remarks touching the effect of bankruptcy upon the capacity of the bankrupt to contract will be sufficient, as it is not within my plan to examine minutely the nature of rights of action which do or do not pass to the assignees,—of liabilities which may be enforceable against them or against the bankrupt, whom, for many purposes, they represent.

It can hardly be incorrect to say, that bankruptcy does in *some* cases affect the capacity of the bankrupt to contract; for instance, it may give an option to his assignees to treat a contract ostensibly entered into with the bankrupt as in

(*r*) *Homersham* v. *Wolverhampton Waterworks Co.*, 6 Exch. 137, distinguished in *Smith* v. *The Hull Glass Co.*, 11 C. B. 928; *Kirk* v. *Bell*, 16 Q. B. 290; *Nowell* v. *Mayor &c. of Worcester*, 9 Exch. 457; *Cope* v. *Thames Haven Dock and R. C.*, 3 Exch. 841. See *Payne* v. *The New South Wales Coal &c. Co.*, 10 Exch. 283.

(*s*) *Smith* v. *The Hull Glass Co.*, 11 C. B. 926, 927. See *Ridley* v. *The Plymouth &c. Baking Co.*, and *The Kingsbridge Flour Mill Co.* v. *The Same*, 2 Exch. 711, 718; *Hallett* v. *Dowdall*, 21 . J., Q. B., 98.

(*t*) As examples of what is above said, see *The Shrewsbury and Birmingham R. C.* v. *The London and North Western R. C.*, 4 De G., Mnc. & G. 115; *The East Anglian R. C.* v. *The Eastern Counties R. C.*, 11 C. B. 775, 811.

fact made with themselves (*u*); it may render void the express promise or agreement of the bankrupt (*x*). Ordinarily, however, the result of bankruptcy rather is to relieve the bankrupt from liabilities, and to devest him of rights and remedies, than to incapacitate him from contracting.

The general effect of the statute, 12 & 13 Vict. c. 106 (*y*), intituled "An Act to amend and consolidate the Laws relating to Bankrupts," is to vest in the assignees appointed under its provisions the whole estate, real and personal, which the bankrupt had or was entitled to *for his own benefit* (*z*), either in possession, remainder, or reversion, at the date of the act of bankruptcy, as also all such property as may come to him before he obtains his certificate of conformity; to confer upon the assignees for the time being the right of suing for outstanding debts and assets of the bankrupt in their own names; and to indemnify them against the costs of such proceedings, when undertaken with the leave and sanction of the Court of Bankruptcy (*a*).

(*u*) Post, p. 580.

(*x*) Post, p. 585.

(*y*) This statute repeals the 6 Geo. 4, c. 16, in toto, and the previous Bankrupt Acts, except in some particulars not here material.

(*z*) Contracts made or property held by a bankrupt *as trustee*, remain unaffected by the bankruptcy: *Boddington* v. *Castelli*, 1 E. & B. 879; *S. C.*, Id. 66, and cases there cited; *Winch* v. *Keeley*, 1 T. R. 619; Per *Lord Campbell*, C. J., *Westoby* v. *Day*, 2 E. & B. 624.

(*a*) Sect. 141 enacts, "that *when any person shall have been adjudged a bankrupt* (immediately after which adjudication an official assignee is, by sect. 102, to be appointed), all his personal estate and effects, present and future, wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised or bequeathed, or come to him before he shall have obtained his certificate, and all debts due or to be due to him, wheresoever the same may be found or known, and the property, right, and interest in such debts, shall become absolutely vested in the assignees for the time being, for the benefit of the creditors of the bankrupt, by virtue of their appointment; and after such appointment,

The bankrupt, being thus on the one hand devested of all property in which he was beneficially interested, receives on the other hand protection from liability in respect of contracts entered into by him prior to his bankruptcy and certificate (*b*). Such being the general effect of the Bankrupt Act, let us proceed to consider its operation upon the capacity to contract.

In the first place, then, it is clearly established, that an *uncertificated* bankrupt may contract, subject to the right of his assignees to interfere, claim the benefit of the contract, and sue in their own names for its breach (*c*). An un-

neither the bankrupt nor any person claiming through or under him shall have power to recover the same, nor to make any release or discharge thereof; neither shall the same be attached as the debt of the bankrupt by any person according to the custom of the city of London or otherwise, but *such assignees shall have like remedy to recover the same in their own names as the bankrupt himself might have had* if he had not been adjudged bankrupt."

The succeeding section (142) vests lands belonging to the bankrupt absolutely in the assignees for the time being, for the benefit of the creditors, by virtue of their appointment, without any deed of conveyance for that purpose.

By sect. 153, "the assignees, *with the leave of the Court first obtained*, upon application to such Court, but not otherwise, may commence, prosecute, or defend any action at law or suit in equity which the bankrupt might have commenced and prosecuted or defended; and in such case the costs to which they may be put in respect of such suit or action shall be allowed out of the proceeds of the estate and effects of the bankrupt."

(*b*) With regard to the future liability of a certificated bankrupt, it is, by the 200th section, generally enacted, "that *the certificate of conformity* allowed under this Act, subject to the provisions herein contained, *shall discharge the bankrupt from all debts due by him when he became bankrupt, and from all claims and demands made proveable under the bankruptcy:* Provided always, that no such certificate shall release or discharge any person who was a partner with such bankrupt at the time of his bankruptcy, or was then jointly bound, or had made any joint contract with such bankrupt." No action, therefore, can be successfully maintained against a certificated bankrupt for any debt due when he became bankrupt, or for any demand which is *proveable against his estate.*

(*c*) *Herbert* v. *Sayer*, 5 Q. B. 965, followed in *Jackson* v. *Burnham*, 8

certificated bankrupt, moreover, has (probably through a feeling of compassion for his situation), been held entitled to contract for his own work and labour, and to recover money due in respect thereof (*d*), (as well as for materials found, incident and necessary thereto (*e*)), or money lent if earned thereby (*f*). The principle, however, of the decisions here adverted to will not, it seems, be at all extended.

In *Elliot* v. *Clayton* (*g*), the plaintiff sued for work and labour as a surgeon and apothecary, for medicines, and on an account stated. The plea to this declaration alleged the bankruptcy of the plaintiff before the debt accrued, and that his assignees claimed the debt from the defendant before action brought. Replication, that the work &c. "was merely the personal labour of plaintiff," and was performed "for the necessary present maintenance of plaintiff and his family;" that the medicines "were purchased and obtained by plaintiff" "out of the earnings and profits of his personal labour performed after bankruptcy;" that they were "greatly increased in value by the personal labour of plaintiff in preparing and administering the same," and were a part of and incidental and necessary to plaintiff's personal labour, and in order that he might perform the same in the manner most advantageous for the necessary present maintenance" &c. "of the plaintiff and his family;" and that the account was stated of such personal labour and such medicines. This replication was traversed by the rejoinder, and issue taken thereupon. Such being the pleadings in this case, it appeared in evidence that the plaintiff was an uncertificated

Exch. 173; *Kitchen* v. *Bartsch*, 7 East, 53; *Drayton* v. *Dale*, 2 B. & C. 293; *Fyson* v. *Chambers*, 9 M. & W. 460.

(*d*) *Chippendale* v. *Tomlinson*, cited 7 East, 58, n. (*g*); Id. 62; *Williams* v. *Chambers*, 10 Q. B. 337.

(*e*) *Silk* v. *Osborne*, 1 Esp. 140.

(*f*) *Evans* v. *Brown*, 1 Esp. 170.

(*g*) 16 Q. B. 581; *Crofton* v. *Poole*, 1 B. & Ad. 568.

bankrupt; that by an arrangement with a friend who had purchased his stock of medicines, he continued in possession of them on credit, carried on his business as before, and was supplied with fresh medicines on credit from wholesale houses; under these circumstances, the debt sued for was contracted, the plaintiff attending the defendant, giving him the benefit of his skill, and furnishing the medicines which he thought necessary. The Court held that the replication, of which the substance has been above set out, was not proved.

Again, a bankrupt, whilst uncertificated, may also enter into a contract of such a kind that its breach would occasion a personal injury to himself—ex. gr., he may contract to be cured of a wound or to marry—in such a case the assignees could not interfere so as to prevent the bankrupt from suing for damages, although it seems clear that he might be compelled to hand them over for the benefit of the creditors when recovered. Some difficulty was formerly experienced in defining with precision the class of cases in which a person's capacity to contract remains unimpaired by his bankruptcy,—as well as in determining when a right of action ex contractu, vested in the bankrupt before bankruptcy, would not be devested thereby (*h*). Much light, however, has recently been thrown upon this subject by two cases: *Beckham* v. *Drake* (*i*) and *Rogers* v.

(*h*) The assignees are, in general, entitled to recover on choses in action which have accrued to them in right of the bankrupt, or for the recovery of damages for any breach of a contract with the bankrupt, committed prior to the bankruptcy. ante, p. 580, n. (*a*). See *Hill* v. *Smith*, 12 M. & W. 618; *Alder* v. *Keighley*, 15 M. & W. 117; Per *Parke*, J., *Kearsey* v. *Carstairs*, 2 B. & Ad. 724; *Porter* v. *Vorley*, 9 Bing. 93, 95; *Wright* v. *Fairfield*, 2 B. & Ad. 727; *Valpy* v. *Oakeley*, 16 Q. B. 941.

(*i*) 2 H. L. Cas. 579; *S. C.*, 11 M. & W. 315, 9 Id. 79, 8 Id. 846,

Spence (*k*); which, having been heard before the highest tribunal, are to be regarded as leading authorities in reference to it. In the former of these cases, *Erle*, J., delivering his opinion to the House of Lords, remarks as follows:—"The right of action does not pass [to a bankrupt's assignees] where the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind, or character, and without immediate reference to his rights of property. Thus it has been laid down, that the assignees cannot sue for breach of promise of marriage, for criminal conversation, seduction, defamation, battery, injury to the person by negligence, as by not carrying safely, not curing, not saving from imprisonment by pro-

where the facts were as follow:—A. entered into an agreement with B. & C. to serve them for seven years at fixed wages,—"the party making default to pay to the other the sum of 500*l.* by way or in nature of specific damages." A. was dismissed; he became bankrupt; and, after the bankruptcy, brought an action of assumpsit on the agreement, to which the defendants pleaded his bankruptcy. This plea was held to be an answer to the action, on the ground that the right to sue for the breach of the agreement in question passed to his assignees. See *Bell* v. *Carey*, 8 C. B. 887, 893.

(*k*) 12 Cl. & F. 700; *S. C.*, 13 M. & W. 571, 11 Id. 191. It was there held, that trespass for seizing and taking a bankrupt's goods under a false and unfounded claim of a debt being due from him, whereby the bankrupt was annoyed and prejudiced in his business and believed by his customers to be insolvent, in consequence whereof certain lodgers left his house, could not be maintained by his assignees. In this case, the plea of the plaintiff's bankruptcy was pleaded "as to the seizing and taking the goods and chattels in the declaration mentioned;" and it was observed (per Lord *Abinger*, C. B., 11 M. & W. 629), that, although such a plea might have been good if limited to the *value* of the goods, yet the jury might, as the record stood, give damages beyond the value of the goods in respect of the *manner* of the seizure, and that the right to sue for such damages would not pass to the assignees. See also *Brewer* v. *Dew*, 11 M. & W. 625; *Clark* v. *Calvert*, 8 Taunt. 742; *Topham* v. *Dent*, 6 Bing. 515.

cess of law"(*l*); and if, in such case, a consequential damage to the personal estate follows from the injury to the person, that may be so dependent upon and inseparable from the personal injury, which is the primary cause of action, that no right to maintain a separate action in respect of such consequential damage will pass to the bankrupt's assignees. Under the circumstances supposed, moreover, the primary cause of action, if of a nature properly speaking personal, and the right to maintain it, would die with the bankrupt(*m*).

In connection with this subject, we must further remember, that, "one side of a contract being either consideration or promise, according as one of the parties is either plaintiff or defendant(*n*), where the question is, whether the assignees of a bankrupt contractor can sue for a breach of a promise broken before the bankruptcy, the nature of the *promise* is alone to be considered; and when the question is, whether the assignees have a right to adopt an unexecuted contract, and, after the bankruptcy, to complete the consideration for the purpose of enforcing the promise(*o*), the nature of the *consideration* is alone to be considered. Thus, in respect of promise, the assignees of a patient, if bankrupt, could not sue a surgeon for a breach of his promise to use due care in treating a wound, because the damages are assessed by reference to bodily annoyance; but the assignees of the same surgeon, if bankrupt,

(*l*) 2 H. L. Cas. 604; *Howard* v. *Crowther*, 8 M. & W. 601; *Hancock* v. *Caffyn*, 8 Bing. 358, 366; *Benson* v. *Flower*, Sir W. Jones, 215.

(*m*) Judgm. *Drake* v. *Beckham*, 11 M. & W. 319. And see also, with reference to the "mixed case of injury to the person and injury to the property," per Lord *Campbell*, *Rogers* v. *Spence*, 12 Cl. & F. 720--1; *Wetherell* v. *Julius*, 10 C. B. 267.

(*n*) Ante, p. 340.

(*o*) See *Whitmore* v. *Gilmour*, 12 M. & W. 808.

might sue the patient on his promise to pay remuneration for attendance, because the promise relates to property: and the assignees of a bankrupt could not sue on a breach of promise to marry; but the same assignees might," says Mr. Justice *Erle*, "for the same reason, sue for a breach of promise to pay a given sum in case of refusing on request to complete a contract of marriage(*p*). Thus also, in respect of consideration, the assignees of a painter might not have a right to adopt an incompleted contract to paint a picture for a sum and complete it, because the personal skill of the contractor would probably be of the essence of the contract; but the assignees of the bankrupt purchaser, being ready with the money which was to be the consideration, might adopt the contract to pay(*q*), and sue the same painter if he refused to complete and deliver the picture according to his promise"(*r*).

The capacity of a bankrupt to bind himself by a contract(*s*) is further, in certain cases, affected by the express provisions of the recent Bankrupt Act, (12 & 13 Vict. c. 106); for instance, s. 202 of this statute enacts, "that any contract or security made or given by any bankrupt or other person unto or in trust for any creditor, for securing

(*p*) See also, per *Maule*, J., 12 Cl. & F. 622, adopted per Lord *Campbell*, Id. 645.

(*q*) *Gibson* v. *Carruthers*, 8 M. & W. 321.

See, as an instance of such adoption, *Twemlow* v. *Askey*, 3 M. & W. 495.

See also the stat. 12 & 13 Vict. c. 106, (ss. 145, 146), which gives an option, in certain cases, to the assignees to adopt or decline a contract entered into by the bankrupt.

(*r*) Per *Erle*, J., 2 H. L. Cas. 604.

(*s*) A bankrupt, whilst uncertificated, is liable to be sued for all debts or demands which are not proved under his bankruptcy, whether they be susceptible of proof or not, provided that a complete cause of action has accrued against him. See *Augarde* v. *Thompson*, 2 M. & W. 617; *Walker* v. *Pilbeam*, 4 C. B. 229; *Temple* v. *Pullen*, 8 Exch. 389.

the payment of any money due by such bankrupt at his bankruptcy, as a consideration or with intent to persuade such creditor to forbear opposing, or to consent to the allowance of the bankrupt's certificate, or to forbear to petition for the recall of the same, shall be void, and the money thereby secured or agreed to be paid shall not be recoverable" (*t*). Also, by sect. 204, it is further enacted, "that no bankrupt, after his certificate shall have been allowed, shall be liable to pay or satisfy any debt, claim, or demand from which he shall have been discharged by virtue of such certificate, or any part of such debt, claim, or demand, upon any contract, promise or agreement made after the issuing of the fiat or filing of the petition for adjudication of bankruptcy."

SECT. II.—*Contracts with Non-mercantile Persons.*

In this section I propose to inquire how far the capacity to contract may be affected by Infancy, Coverture, Mental Imbecility, or otherwise; and under what circumstances an Executor, Administrator, or Insolvent may enter into a contract binding as regards himself, or as regards the estate which he has to administer, or on behalf of which he may be supposed to act.

Contracts with an infant.

An infant, by reason of his tender years and presumed immaturity of judgment, is specially protected by our law; for, although an infant may sue for breach of a contract entered into with him (*u*)—as for a breach of promise of mar-

(*t*) See also sect. 270; 5 & 6 Vict. c. 122, s. 40; *Taylor* v. *Wilson*, 5 Exch. 251.

As to the former law upon this subject, see 5 & 6 Vict. c. 122, s. 43; 6 Geo. 4, c. 16, s. 131; *Trueman* v. *Fenton*, 1 Smith L. C. 369.

(*u*) *Warwick* v. *Bruce*, 2 M. & Sel. 205; *S. C.* (in error), 6 Taunt. 118; Bac. Abr. "Infancy," (I. 4).

riage(*v*)—yet where it is sought to recover damages against him by action ex contractu, the fact of his infancy at the date of the contract will, in most cases, be pleadable in answer to such action(*x*). It must not, however, thence be inferred, that an infant labours under a total incapacity to contract—in other words, that his contract is *void in toto*—it is in general *voidable* only(*y*).

In regard to the true nature of the contract of an infant, and the question whether it be voidable or void, some difficulty exists, caused by the different meanings which have, on different occasions, been assigned to the word "*void.*" If thereby is meant *incapable of being enforced*, the contract of an infant for goods sold and delivered (not being *necessaries*(*z*)), is altogether void, inasmuch as the plea of infancy will be a bar to an action for their price. If, however, by "void" is meant *incapable of being ratified*(*a*), very few contracts entered into by an infant will be found to be wholly void. They are so, indeed, according to the weight of authority, when manifestly and necessarily prejudicial to him, but not otherwise. Thus it is laid down(*b*), that "an infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himself afterwards; but if he bind himself in an obligation or other writing *with a penalty* for the pay-

(*v*) *Holt* v. *Ward*, 2 Str. 937.

(*x*) This privilege "is given as a shield and not as a sword," and "it never shall be turned into an offensive weapon of fraud or injustice:" per Lord *Mansfield*, C. J., 3 Burr. 1802.

(*y*) *Goode* v. *Harrison*, 5 B. & Ald. 147, 159; *Corpe* v. *Overton*, 10 Bing. 252; Per *Gibbs*, C. J., 6 Taunt. 120.

(*z*) As to which, see post, p. 591.

(*a*) See the Judgm., *Williams* v. *Moor*, 11 M. & W. 264; *Gibbs* v. *Merrill*, 3 Taunt. 313.

(*b*) Co. Litt. 172. a.; adopted per *Tindal*, C. J., 10 Bing. 257. See 1 M. & Gr. 551, (*b*).

ment of any of these, *that obligation shall not bind him.*" So it has been held(*c*), that an infant cannot bind himself in a bond with a penalty conditioned for the payment of *interest* as well as principal, the objection, as remarked by Lord *Ellenborough*, C. J., going "not merely to the quantum of damages, but to *avoid the whole security;* for the judgment must be for the sum due upon the bond, and part of that sum is due for interest, for which an infant *cannot give a security.*"

Further, a cognovit given by an infant, authorising an attorney to appear for him and confess an action brought against him for necessaries furnished to him by the plaintiff, with an undertaking not to bring a writ of error &c., was, in *Oliver* v. *Woodroffe* (*d*), held to be invalid, and was ordered to be taken off the file and cancelled, upon three grounds:—1. That an infant cannot appoint an attorney; 2. That he cannot state an account so as to bind himself (*e*); and 3. That he *cannot do any act to prejudice his rights.* So, a contract by an infant, binding him to serve during a certain time for wages, but enabling the master to stop the work whenever he chose, and to retain the wages during stoppage, was, in *Reg.* v. *Lord* (*f*), adjudged to be inequitable and *wholly void.*

Again, in Perkins's Profitable Book (*g*), it is said to be a common learning, "that all such gifts, grants, or deeds

(*c*) *Fisher* v. *Mowbray*, 8 East, 330; *Baylis* v. *Dinely*, 3 M. & Sel. 477.

In *Latt* v. *Booth*, 3 C. & K. 292, *Williams*, J., intimated an opinion, that an assignment of goods by an infant, set up as a defence to an action of trover brought for their conversion by the defendant (the assignee), was absolutely void.

(*d*) 4 M. & W. 650.

(*e*) See *Williams* v. *Moor*, 11 M. & W. 256.

(*f*) 12 Q. B. 757. See *Wood* v. *Fenwick*, 10 M. & W. 195; *Rex* v. *Inhabs. of Chillesford*, 4 B. & C. 94, 101.

(*g*) Sect. 12.

made by an infant, as do not take effect by delivery of his hand, are *void*. But all gifts, grants, or deeds made by an infant by matter in deed or in writing, which *take effect* (*h*) by delivery of his own hand, are *voidable* by himself and his heirs and by those who have his estate." The doctrine here laid down was assented to by Lord *Mansfield*, C. J., in *Zouch* v. *Parsons* (*i*), where a conveyance by an infant mortgagee was held to be voidable only; and a distinction was taken between the deed of a feme covert and that of an infant—the former being void, the latter voidable. The same doctrine was also recognised as sound in *Allen* v. *Allen* (*j*), by Sir *E. Sugden*, who observes, "It cannot be said that all instruments executed by infants are void," (ex. gr. "a lease executed by an infant with a reservation of rent is only voidable" (*k*)), though, "if an infant has executed a deed which proves to be injurious to his interests, it is voidable, and he may set it aside when he attains his full age."

The capacity of an infant to contract, and the question—under what circumstances will he, on becoming of full age, be liable on his contract made durante minore ætate?—have been much considered on some recent occasions, where actions of debt have been brought against infant shareholders in railway companies, to compel the payment of calls due upon their shares. Now, in general, "an infant or minor hath, without consent of any other, capacity to pur-

(*h*) "The words 'which do take effect' are an essential part of the definition, and exclude letters of attorney, or deeds which delegate a mere power and convey no interest:" 3 Burr. 1804.

(*i*) 3 Burr. 1794, 1804; recognised by Lord *Eldon*, *Anon.* v. *Handcock*, 17 Ves. 383.

(*j*) 2 Dr. & W. 307, 338.

(*k*) See Judgm., 5 Exch. 126; Per *Parke*, B., 4 Exch. 30; Woodf. L. & T. 6th ed., pp. 653–4; Per *Buller*, J., *Maddon* v. *White*, 2 T. R. 161; Platt on Leases, vol. 1, p. 28. And see the authorities cited, Judgm., 3 Exch. 575.

chase; for it is intended for his benefit, and at his full age he may either agree thereunto and perfect it; or, without any cause to be alleged, waive or disagree to the purchase" (*l*). So an infant shareholder in a railway company acquires, on being registered, a vested interest of a permanent character in all the profits arising from the land and other effects of the company; he may be deemed a purchaser in possession of such interest, and is placed in a position analogous to that of a purchaser in possession of real estate. Under the Companies Clauses Consolidation Act, an infant, registered as a shareholder in a railway company, is not absolutely bound, nor deprived of the right which the law gives every infant of waiving and disagreeing to the purchase which he has made; if he does so, the estate acquired by the purchase is at an end, and with it the infant's liability to pay calls, though the avoidance may not have taken place till the call was due (*m*).

Where, however, an estate has become and remains vested in an infant, the burthen in respect of it will remain obligatory *until a waiver or disagreement by the infant takes place*, which, if made on or *within a reasonable time* after (*n*) attaining his full age, will avoid the estate altogether and revest it in the party from whom the infant purchased; if made within age, will suspend it only, because such disagreement may be again recalled when the infant attains his majority (*o*). Such are the princi-

(*l*) Co. Litt. 2. b.

(*m*) *The North Western R. C.* v. *M'Michael*, and *The Birkenhead &c. R. C.* v. *Pilcher*, 5 Exch. 114, 125; *Leeds and Thirsk R. C.* v. *Fearnley*, 4 Exch. 26; *Cork and Bandon R. C.* v. *Cazenove*, 10 Q. B. 935.

(*n*) *The Dublin and Wicklow R. C.* v. *Black*, 8 Exch. 181; *Holmes* v. *Blogg*, 8 Taunt. 39--40.

(*o*) *The North Western R. C.* v. *M'Michael*, and *The Birkenhead &c. R. C.* v. *Pilcher*, 5 Exch. 24, 114, 125; *The Newry and Enniskillen R. C.* v. *Coombe*, 3 Exch. 565.

ples by which to determine the liability of an infant shareholder in a railway company who is sued for calls due in respect of his shares, either whilst still a minor (in which case, however, little difficulty can present itself) or after he has attained his majority.

But although the contract of an infant is in general voidable, he may contract for *necessaries;* and he may, by compliance with certain statutory provisions, on attaining his full age, ratify or renew his liability upon a voidable contract made by him prior thereto. To each of the points here indicated attention must now briefly be directed.

An infant can contract so as to bind himself in those cases where it is *necessary* for him to have the things for which he contracts. Things necessary are those without which an individual cannot reasonably be supposed to exist. In the first place, food, raiment, lodging, and the like, are clearly necessaries. Again, as the proper cultivation of the mind is as expedient as the support of the body, instruction in art or trade, or intellectual, moral, and religious information, may be a necessary also. Again, as man lives in society, the assistance and attendance of others may be a necessary to his well-being. Hence, attendance may be the subject of an infant's contract (*p*).

The several classes of things which *may* be necessaries being thus established, the subject-matter and extent of the particular contract on which it is sought to charge the infant may vary according to his state and condition in life. His clothes may be fine or coarse, according to his rank; his education may vary according to the station he is to fill, and the medicines chargeable to him as necessaries will depend on the illness with which he is afflicted, and the extent of his probable means when of age (*q*). So, again,

(*p*) Judgm., 13 M. & W. 258. (*q*) See *Hart* v. *Prater*, 1 Jur. 623.

the nature and extent of the attendance will depend on his position in society; ex. gr. a servant in livery may be allowed to a rich infant, because such attendance is commonly appropriated to persons in his rank of life. Subject, however, to the above remarks, it must always be made out that the things furnished, which form the subject-matter of the given contract, are essential to the existence and reasonable advantage and comfort of the infant contractor. Thus, articles of *mere* luxury are always excluded, though luxurious articles of utility are in some cases allowed. So contracts for charitable assistance to others, though highly to be praised, cannot be allowed to be binding, because they do not relate to the infant's own personal advantage (*r*).

"The true rule," says *Parke*, B., in a case (*s*) often cited in reference to the subject before us, "I take to be this: All such articles as are purely ornamental are not necessary, and are to be rejected, because they cannot be requisite for any one; and for such matters, therefore, an infant *cannot* be made responsible. But, if they are not strictly of this description, then the question arises, whether they were bought for the necessary use of the party, in order to support himself properly in the degree, state, and station of life in which he moved; if they were, for such articles the infant *may* be responsible." The question for the jury will be this: Were the articles bought for *mere ornament?* If so, they *cannot* be necessaries for any one.

(*r*) Judgm., *Chapple* v. *Cooper*, 13 M. & W. 258 (where an infant widow was held to be liable on her contract to pay for the funeral of her husband, who died leaving no property); ante, pp. 587, 588.

(*s*) *Peters* v. *Fleming*, 6 M. & W. 47; followed in *Wharton* v. *Mackenzie* and *Cripps* v. *Hills*, 5 Q. B. 606, 611. See *Burghart* v. *Hall*, 4 M. & W. 727.

The older cases as to necessaries are collected in Harrison's Dig., 3rd ed., vol. 2, pp. 3275 et seq.

Were they bought for *real use?* If so, they *may* be necessaries, provided they are suitable to the infant's age, state, and degree. The jury, therefore, must say whether they are such as reasonable persons, of the age and station of the infant, would require for *real use.* If so, they *will* be necessaries for which an infant will be liable (*u*).

Ratification of promise by infant.

In regard to the confirmation of promises made by an infant, the statute 9 Geo. 4, c. 14, s. 5, enacts as follows: "That no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing, signed by the party to be charged therewith." We see that by the above statute there must be either a *promise* by the defendant in writing after he has come of age, *or* a written *ratification* by him of the prior contract. Hence we may infer, that the meaning of the word "ratification," here used, is somewhat different from that of "promise." It seems to imply "an admission that the party is liable and bound to pay the debt arising from a contract which he made when an infant" (*x*). In order, therefore, to bring a case within the statute, there must be either a *new promise* in writing by the defendant when of age, or an *admission* in writing by him that he is liable and bound to pay in præsenti on that contract which he made when a minor (*x*). Any written instru-

(*u*) Per *Alderson*, B., *Peters* v. *Fleming*, 6 M. & W. 48. As to what are or are not necessaries, see further, *Harrison* v. *Fane*, 1 M. & Gr. 550; *Brooker* v. *Scott*, 11 M. & W. 67.

(*x*) Per *Parke*, B., *Mawson* v. *Blane*, 10 Exch. 210; *Harris* v. *Wall*, 1 Exch. 122; *Hartley* v. *Wharton*, 11 Ad. & E. 934.

ment, accordingly, signed by the party, which in the case of an adult would have amounted to the adoption of the act of another as agent, will, in the case of an infant who has attained his majority, amount to a ratification (*y*).

The principle on which the law allows a party who has attained his age of twenty-one years to give validity to contracts entered into during his infancy, is, that he is supposed, when of full age, to have acquired the power of deciding for himself whether the transaction in question is one of a meritorious character, by which in good conscience he ought to be bound. If an infant, having had dealings with an adult, meets and settles accounts with him during his infancy, in the ordinary way, and a balance is struck and vouchers are destroyed, he does that which creates no legal liability on his part. But if, on attaining his age of twenty-one years, he is satisfied of the fairness of the settlement of accounts thus made, there seems to be good reason why he should be permitted to confirm that settlement, and render himself liable for the balance. This liability he may accordingly, in the case supposed, assume; and the same principle applies to a claim in respect of work and labour performed, or goods sold and delivered, &c., during minority (*z*).

Where, however, a defendant means to rely on the defence of infancy, he must plead it specially (*a*); and to this plea the plaintiff may reply, that the goods in question were necessaries, or that the defendant ratified and confirmed the contract after attaining his full age (*b*).

The foregoing remarks, it must be observed, apply ex-

(*y*) Judgm., *Harris* v. *Wall*, 1 Exch. 130.

(*z*) Judgm., *Williams* v. *Moor*, 11 M. & W. 265.

(*a*) Reg. Trin. T. 1853, (reg. 8). See *Roberts* v. *Bethell*, 12 C. B. 778.

(*b*) See *Mawson* v. *Blane*, 10 Exch. 206; *Harrison* v. *Cotgreave*, 4 C. B.

clusively to the capacity of persons within the age of discretion to contract. "The capacity of infants," it has been said (c), "to commit crimes, their punishableness for criminal offences, their liability, civilly, for various wrongs not connected in any sense with contract, as, for instance, battery and slander (d), to say nothing of the clear right, in some circumstances, to maintain trover against them, are of universal recognition. But questions, which have not been considered free from difficulty, have arisen, whether, or how far, persons are civilly liable at law for wrongs, or such acts as, if they were the acts of adults, would be wrongs, done during infancy, when connected, or supposed to be connected, with contracts." In any such case, the gist of the action must be narrowly examined, with a view to determining whether it be really founded in contract or in tort. It seems that an infant who has induced an adult to contract with him, by representing himself to be of full age, could not be made answerable in case (e); and it is clear, that, if the cause of action against an infant be founded upon contract, it cannot, at the mere option of the plaintiff, by shaping his declaration accordingly, be converted into a tort, for the purpose of charging the infant defendant (f).

562; *Borthwick* v. *Carruthers*, 1 T. R. 648. The new promise, or ratification, in respect of which it is sought to charge the defendant, must, however, have been made before action brought: *Thornton* v. *Illingworth*, 2 B. & C. 824.

An infant may, during infancy, effectually sign an acknowledgment in writing so as to take a debt incurred for necessaries out of the operation of the Statute of Limitations: *Williams* v. *Smith*, 24 L. J., Q. B., 62.

(c) Per *Knight Bruce*, V. C., *Stikeman* v. *Dawson*, 1 De G. & S. 110.

(d) Per Lord *Kenyon*, C. J., 8 T. R. 337; *Hodsman* v. *Grissel*, Noy, 129; Co. Litt. 180. b. n. (4); *Johnson* v. *Pie*, 1 Lev. 169.

(e) See *Price* v. *Hewett*, 8 Exch. 146; *Liverpool Adelphi Loan Association* v. *Fairhurst*, 9 Exch. 422; *Overton* v. *Banister*, 3 Hare, 503; *Goode* v. *Harrison*, 5 B. & Ald. 147.

(f) *Jennings* v. *Rundall*, 8 T. R. 338; *Johnson* v. *Pie*, 1 Lev. 169, *S. C.*, 1 Keb. 905, 913; *Green* v. *Green*-

An infant, however, although for his own sake protected by an incapacity to bind himself by contracts, except for necessaries, may be *doli capax*, in a civil sense and for civil purposes, in the view of a Court of equity (*g*).

Effect of coverture on the capacity to contract.

The effect of marriage is, for most purposes, to render husband and wife one person in contemplation of law (*h*), and to merge, during coverture, the existence of the wife in that of the husband. A feme covert, accordingly, having no legal entity, is on that sole ground incapable of binding herself by a contract.

A contract by a married woman is, in fact, altogether void; and no action for breach of it will lie against herself, unless the matrimonial relation has been annulled, suspended, or terminated; or against her husband, unless in certain cases which will immediately be noticed. The marriage tie may be annulled ab initio by a sentence of the Prerogative Court (*i*). It may be severed and determined by a divorce à vinculo matrimonii (*j*), or by the civil death

bank, 2 Marsh. 485; Judgm., *Manby* v. *Scott*, 2 Smith L. C. 271–2.

See *Mills* v. *Graham*, 1 N. R. 140, 145; *Bristow* v. *Eastman*, 1 Esp. 172.

(*g*) Judgm., 1 De G. & S. 109.

(*h*) 1 Bla. Com. 442; Co. Litt. 112; *Marshall* v. *Rutton*, 8 T. R. 546.

There are, however, exceptions to this rule: 1 Bla. Com. 444, 1 Powell, Contr. p. 60; Per *Maule*, J., *Wenman* v. *Ash*, 13 C. B. 844–5, where that learned Judge remarks, that, "In the eye of the law, no doubt, man and wife are, for many purposes, one; but that is a strong figurative expression and cannot be so dealt with as that all the consequences must follow which would result from its being literally true. For many purposes they are essentially distinct and different persons—and, amongst others, for the purpose of having the honour and the feelings of the husband assailed and injured by acts done or communications made to the wife." So the husband may be found guilty of crimes of violence towards the wife, and vice versâ.

(*i*) *Anstey* v. *Manners*, 1 Gow, 10.

(*j*) Co. Litt. 133. a.; 1 Bla. Com. 443; Bac. Abr. "Bar. and Feme" (M); Per *Abbott*, C. J., *Lewis* v. *Lee*, 3 B. & C. 297; *Marshall* v. *Rutton*, 8 T. R. 548; Per *Blackstone*, J., *Hatchett* v. *Baddeley*, 2 W. Bl. 1082; Per *Tindal*, C. J., *Williamson* v. *Dawes*, 9 Bing. 295.

of the husband (*k*). It may in certain cases be suspended, by some temporary disability cast upon him (*l*).

The husband will be liable on the contracts of the wife, when acting *as his agent* (*m*), express or implied; the fact of agency being implied under circumstances which will presently be stated.

Such is a brief view of the effect of marriage on the wife's capacity to contract, consequent on the merger of her existence in that of her husband. From the principle just stated it follows also that, at law, no contract can be made between husband and wife without the intervention of trustees; the feme, moreover, being considered as *sub potestate viri*, and being deemed incapable of contracting with the baron (*n*). "A man," therefore, "cannot grant anything to his wife, or enter into covenant with her; for the grant would be to suppose her separate existence, and to covenant with her would be only to covenant with himself" (*o*); and hence, also, it is generally true, "that all compacts made between husband and wife when single are voided by the inter-

Wife cannot contract with husband.

(*k*) *Belknap's case*, Co. Litt. 132. b.; Judgm., *Beard* v. *Webb*, 2 B. & P. 105. See *Barden* v. *De Keverberg*, 2 M. & W. 61.

(*l*) *Sparrow* v. *Carruthers*, cited 2 W. Bl. 1197; *Ex parte Franks*, 7 Bing. 762; *Carrol* v. *Blencow*, 4 Esp. 27. See *Boggett* v. *Frier*, 11 East, 301.

(*m*) See post, pp. 599, 601.

If A. and B. live together as man and wife, although not really so related to each other, A. *may*, even after the connection has been severed, be liable on B.'s contracts,—whether he is so or not will usually depend upon the proof of agency: *Ryan* v. *Sams*, 12 Q. B. 460.

(*n*) 2 Kent's Com., 7th ed., p. 106.

To the presumption of law above mentioned is, also, by some writers, referred the general incapacity of a feme covert to bind herself or her husband by her assent to any contract or agreement in pais; she being, in consideration of law, *under the coercion and dominion of her husband*, and consequently having no moral capacity to assent to a contract either respecting his property or her own:" 1 Powell, Contr. p. 59.

(*o*) 1 Bla. Com. 442. See *Mews* v. *Mews*, 15 Beav. 529; *Price* v. *Price*, 14 Id. 598, *S. C.* 1 De G., Mac. & G. 308.

marriage" (*p*); and that, if a man marries a woman to whom he is indebted, the debt is extinguished (*q*).

Let us now look at the subject before us—viz. the wife's incapacity to contract—from rather a different point of view, and inquire whether there may not be other reasons assigned for it in addition to those already stated.

The effect of marriage at common law is to vest in the husband the wife's personalty in possession; to entitle him to the rents and profits of her real estate; and to confer on him the right of reducing into possession, for his own benefit, her chattels real and choses in action (*r*).

So completely is a feme covert disabled from holding or recovering property during coverture in her own right, that if a woman possesses personal property, marries and settles it upon herself without the intervention of a trustee, the husband is, *in law*, the absolute owner of the property (*s*). So the property in wearing apparel, bought by the wife for herself whilst living with her husband, out of money settled to her separate use before marriage, and paid to her by the trustees of her settlement, vests by law in the husband, and is liable to be taken in execution for his debts (*t*). And the savings of the wife, whilst separated by agreement from her husband, out of a weekly sum allowed by him for her

(*p*) 1 Bla. Com. 442.

(*q*) Per *Coleridge*, J., *Dolling* v. *White*, 22 L. J., Q. B., 327.

(*r*) 2 Bla. Com. 433, 435; *Robertson* v. *Norris*, 11 Q. B. 916; Co. Litt. 300. a., 351. b.; Com. Dig. "Bar. and Feme" (E); Bac. Abr. "Bar. and Feme" (C); *Maddox* v. *Winne*, 3 Salk. 62. See *Fitzgerald* v. *Fitzgerald*, 8 C. B. 592, and the authorities there cited; *Dodgson* v. *Bell*, 5 Exch. 967; *Simmons* v. *Edwards*, 16 M. & W. 838; *Waller* v. *Drakeford*, 1 E. & B. 749.

As to the reduction into possession of the wife's property by her husband, see *Howard* v. *Oakes*, 3 Exch. 136; *Sherrington* v. *Yates*, 12 M. & W. 855; *Hart* v. *Stephens*, 6 Q. B. 937, and cases there cited; *Scarpellini* v. *Atcheson*, 7 Q. B. 864; *Gaters* v. *Madeley*, 6 M. & W. 423.

(*s*) Per *Williams*, J., 13 C. B. 648.

(*t*) *Carne* v. *Brice*, 7 M. & W. 183.

support, may, after her death, be recovered in an action for money lent, at his suit, from one to whom, shortly before her death, they had been disposed of by the wife by way of gift (*u*).

Further, the husband may, in his own name, recover wages accruing to his wife (*v*), the profits of a business carried on by her (*x*), or for her work and labour (*y*), for goods sold or money lent by her (*z*), and in other like cases.

The wife, being thus by marriage devested of her property and rendered incapable (except sub modo) of acquiring and retaining any, cannot, in reason, be held liable upon contracts ostensibly entered into with her; and accordingly, at law, a feme covert is incompetent to enter into a contract, save as the agent of her husband; such a contract, if unauthorised by him, is altogether void; it can give no right of action to the wife (*a*), nor impose a several liability upon her (*b*). It has, in pursuance of this doctrine, even been held, that an action will not lie against husband and wife for a false and fraudulent representation by the wife to the plaintiff that she was sole and unmarried, made at the time of her signing a promissory note as surety to him for a third person, whereby the plaintiff was induced to ad-

(*u*) *Messenger* v. *Clarke*, 5 Exch. 388; *Bird* v. *Peagrum*, 13 C. B. 639; *Tugman* v. *Hopkins*, 4 M. & Gr. 389.

(*v*) Per Lord *Abinger*, C. B., *Dengate* v. *Gardiner*, 4 M. & W. 7.

(*x*) *Saville* v. *Sweeney*, 4 B. & Ad. 514, 522, 524.

(*y*) *Buckley* v. *Collier*, 1 Salk. 114, 3 Id. 63; Bac. Abr. "Bar. and Feme" (D).

(*z*) Com. Dig. "Bar. and Feme" (W); *Holmes* v. *Wood*, 1 Barnard. 75, 249, cited 2 Wils. 424, and 2 M. & Sel. 396; *Bidgood* v. *Way*, 2 W. Bla. 1236; *King* v. *Basingham*, 8 Mod. 199, 341.

(*a*) See however, post, p. 600, n. (*d*).

(*b*) Judgm., 9 Exch. 429; Com. Dig. "Bar. and Feme" (Q). See *Smith* v. *Plomer*, 15 East, 607; *Sanderson* v. *Griffiths*, 5 B. & C. 909.

vance a sum of money to that person. "A feme covert," remarked the Court of Exchequer, delivering judgment in the case here alluded to (*c*), "is undoubtedly responsible for all torts committed by her during coverture, and the husband must be joined as a defendant. They are liable, therefore, for frauds committed by her on any person, as for any other personal wrongs. But where the fraud is directly connected with the contract with the wife, and is the means of effecting it, and parcel of the same transaction, the wife cannot be responsible and the husband be sued for it together with the wife. If this were allowed, it is obvious that the wife would lose the protection which the law gives her against contracts made by her during coverture;" because every such contract might be considered as involving in itself a fraudulent representation of the wife's capacity to contract.

The decision just cited strongly shews under how complete an incapacity to contract a married woman labours (*d*); that she does so was, indeed, one of the points resolved in the celebrated case of *Manby* v. *Scott* (*e*), where it was held, 1. That husbands are bound to supply their wives with neces-

(*c*) *The Liverpool Adelphi Loan Ass.* v. *Fairhurst*, 9 Exch. 422, 429. See also *Cannam* v. *Farmer*, 3 Exch. 698; *Davenport* v. *Nelson*, 4 Camp. 26; *Glenister* v. *Lady Thynne*, cited 1 Tayl. Ev. 565.

(*d*) See also *Neve* v. *Hollands*, 21 L. J., Q. B., 289; *Johnson* v. *Lucas*, 1 E. & B. 659, distinguishing *Wells* v. *Nurse*, 1 Ad. & E. 65; *S. C.*, 4 B. & Ad. 739.

A feme covert may, however, in some cases, sue or be sued jointly with her husband in respect of a cause of action ex contractu accruing during coverture: Broom's Pract., vol. 1, pp. 274–277, 468.

Coverture must be specially pleaded (Reg. Trin. T. 1853, reg. 8); but a feme covert may sue or be sued as a feme sole, subject to a special plea in bar or in abatement of her coverture. See *Dalton* v. *The Midland R. C.*, 13 C. B. 474; *Woodgate* v. *Potts*, 2 C. & K. 457; *Bendix* v. *Wakeman*, 12 M. & W. 97.

(*e*) 1 Lev. 4, and 2 Smith L. C. 245.

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saries; 2. That *the contract of a married woman is merely void*, as far as she is concerned, by our law; 3. That, if the wife purchase goods, and the husband by any act, precedent or subsequent, ratifies the contract by his assent, the husband shall be liable upon it; whereas the husband is not liable in respect of a contract made by his wife, without his assent to it, and a party seeking to charge him in respect of such a contract is bound to prove either an *express* assent on his part, or circumstances from which such assent is to be *implied* (*f*); and hence it is generally said, that the wife can only contract *as agent for* her husband (*g*).

We have already seen that the wife may bind her husband when acting with his express sanction, as by accepting or indorsing a bill of exchange in his name, or in her own by his direction (*h*). The circumstances under which a feme covert has an implied authority to bind her husband for *necessaries* (*i*) may be classified as under (*k*):—

1. In the first place, whenever the husband and wife are living together, and the husband provides the wife with ne-

(*f*) Per *Littledale*, J., 3 B. & C. 637.

(*g*) Co. Litt. 112. a.; Com. Dig. "Bar. and Feme" (D 1); Per *Blackstone*, J., *Stevenson* v. *Hardie*, 2 W. Bla. 873; *Smout* v. *Ilbery*, 10 M. & W. 1, cited ante, p. 550; *Longmeid* v. *Holliday*, 6 Exch. 761.

(*h*) *Lindus* v. *Bradwell*, 5 C. B. 583, cited ante, p. 458; *Smith* v. *Marsack*, 6 C. B. 486; *Lord* v. *Hall*, 8 C. B. 627; *Howard* v. *Oakes*, 3 Exch. 136.

See *West* v. *Wheeler*, 2 C. & K. 714; *Smallpiece* v. *Dawes*, 7 Car. & P. 40.

(*i*) As to what are necessaries, see *Hunt* v. *De Blaquiere*, 5 Bing. 550; *Chapple* v. *Cooper*, 13 M. & W. 252, cited ante, p. 592, n. (*r*); *Grindell* v. *Godmond*, 5 Ad. & E. 755; Per Lord *Brougham*, C., *Howard* v. *Digby*, 2 Cl. & F. 679, and cases infra.

(*k*) For full information respecting this part of the subject, the reader is referred to the note to *Manby* v. *Scott*, 2 Smith L. C. 281-2, et seq.

An epitome of the law as to the husband's liability for necessaries supplied to the wife is given by Lord *Holt*, C. J., in *Etherington* v. *Parrot*, 1 Salk. 118.

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cessaries, the husband is not bound by contracts of the wife, even for necessaries, unless there be reasonable evidence to shew that the wife has made the contract with his assent (*l*), ex. gr. if he has seen her habitually wearing expensive articles of dress without expressing disapprobation (*m*), or if he has adopted and ratified her act (*n*).

In *Montague* v. *Benedict* (*o*), which is a leading authority upon this part of the subject, the action was for goods sold and delivered. It appeared that the plaintiff was a jeweller, who, in the course of two months, had delivered articles of jewelry to the defendant's wife, amounting in value to 83*l.*; the defendant was a certificated special pleader, living in a ready furnished house, of which the annual rent was 200*l.*; he kept no man servant; his wife's fortune, upon her marriage, was less than 4000*l*; she had, at the time of her marriage, jewelry suitable to her condition; and it was proved that she had never in her husband's presence worn any of the articles furnished by the plaintiff. It appeared, also, that the plaintiff, when he went to the defendant's house to ask for payment of his bill, always inquired for the wife and not for the defendant. It was held, that the goods for which the plaintiff sued were not necessaries, and that, as there was no evidence of any assent of the husband to the contract made by his wife, the action could not be maintained. "If," remarked *Bayley*, J., "a tradesman is about to trust a married woman for what are not necessaries, and to an extent beyond what her station in life requires, he

(*l*) Per *Bayley*, J., 3 B. & C. 635; *Seaton* v. *Benedict*, 5 Bing. 28; *Spreadbury* v. *Chapman*, 8 Car. & P. 371; *Holt* v. *Brien*, 4 B. & Ald. 252.

(*m*) Per *Best*, C. J., 5 Bing. 31.

(*n*) *West* v. *Wheeler*, 2 C. & K. 714.

(*o*) 3 B. & C. 631, and 2 Smith L. C. p. 273.

ought, in common prudence, to inquire of the husband if she has his consent for the order she is giving; and if he had so inquired in this case, it is not improbable that the husband might have told him not to trust her."

Again, where the husband and wife are living together, in regard to orders given by the wife in those departments of her husband's household which she has under her control, the jury may *infer* that the wife was the agent of her husband, unless or until the contrary appear (*p*). So, for articles necessary for the wife, such as clothes, if the order is given by the wife and she is living with her husband, and *nothing appear to the contrary*, the jury do right by inferring the agency; but if the order is excessive in point of extent, or if, when the husband has a small income, the wife gives extravagant orders, these are circumstances from which the jury would infer that there was no agency (*p*). The tradesman, then, who supplies goods to a married woman will, if the bill is one of an extravagant nature, such as the husband would never have authorised, run the risk of losing his money, because, from the extravagance of the order, coupled with other circumstances, the jury may reject the inference of agency (*q*). "It is the bounden duty of tradesmen, when they find a wife giving extravagant orders, to give notice to the husband immediately, if they mean to hold him liable" (*r*).

2. Where husband and wife are living together, and the husband will *not* supply his wife with necessaries or the

(*p*) Per Lord *Abinger*, C. B., *Freestone* v. *Butcher*, 9 Car. & P. 647, and in *Emmett* v. *Norton*, 8 Id. 510.

(*q*) See the remarks of Lord *Abinger*, C. B., in *Freestone* v. *Butcher*, supra, as qualified by *Parke*, B., in *Lane* v. *Ironmonger*, 13 M. & W 370.

(*r*) *Freestone* v. *Butcher*, supra

means of obtaining them, she is, by our common law, at liberty to pledge her husband's credit for what is strictly requisite for her own support (*s*).

"Undoubtedly," says *Holroyd*, J., (in *Montague* v. *Benedict* (*t*), already cited), "the husband is liable for necessaries provided for his wife, *where he neglects to provide them himself.* If, however, there be no necessity for the articles provided, the tradesman will not be entitled to recover their value unless he can shew an express or implied assent of the husband to the contract made by the wife. Where a tradesman takes no pains to ascertain whether the necessity exists or not, he supplies the articles at his own peril; and if it turn out that the necessity does not exist, the husband is not responsible for what may be furnished to his wife without his knowledge. Where a tradesman provides articles for a person whom he knows to be a married woman, it is his duty, if he wishes to make the husband responsible, to inquire if she has her husband's authority or not, for where he chooses to trust her, in the expectation that she will pay, he must take the consequence if she does not" (*u*).

3. Where the husband and wife are living apart *by mutual consent*, and the husband makes the wife a sufficient allowance for her support, he is not liable to a tradesman for goods supplied to her; and whether the tradesman knew of such allowance or not, has been held to be immaterial (*x*). In this case, accordingly, the question for the jury will be—

(*s*) Per *Bayley*, J., 3 B. & C. 631.

(*t*) 3 B. & C. 636-7.

(*u*) See *Reneaux* v. *Teakle*, 8 Exch. 680; *Atkins* v. *Curwood*, 7 Car. & P. 756; *Bentley* v. *Griffin*, 5 Taunt. 356.

(*x*) *Reeve* v. *Marquis of Conyngham*, 2 C. & K. 444; *Holder* v. *Cope*, Id. 437. See *Reg.* v. *Plummer*, 1 C. & K. 600; *Edwards* v. *Towells*, 5 M. & Gr. 624; *Howard* v. *Digby*, 2 Cl. & F. 679; *Dixon* v. *Hurrell*, 8 Car. & P. 717.

Has the husband given the wife sufficient for *necessaries suitable to his degree?* If so, he will not be liable on the wife's contracts (*y*), unless proof be given that he has sanctioned or adopted them (*z*).

Where the husband and wife are living separate, we must remember, however, that, (as observed by *Abbott*, C. J., in *Mainwaring* v. *Leslie* (*a*)), there is *no presumption* that the wife has authority to bind her husband "even for necessaries suitable to her degree in life: it is for the plaintiff to shew, that, under the circumstances of the separation or from the conduct of the husband, she had such authority. The mischief of allowing the ordering of goods by a married woman living apart from her husband to be primâ facie evidence, so as to charge him for them, would be incalculable."

4. If the husband has turned the wife out of doors, or by his indecent conduct has precluded her from living with him, and does not give her adequate means of subsistence according to his degree in life and his fortune, the law makes her his agent to order such things as are reasonable and necessary for herself; but it gives her no liberty to go into any extravagance, or to pledge his credit for anything beyond what would be reasonable and necessary for her subsistence (*l*). In like manner "if a man will not receive his

(*y*) Per Lord *Abinger*, C. B., *Emmett* v. *Norton*, 8 Car. & P. 511; *Hodgkinson* v. *Fletcher*, 4 Camp. 70; *Liddlow* v. *Wilmot*, 2 Stark. N. P. C. 86; *Wilson* v. *Smyth*, 1 B. & Ad. 801.

(*z*) *Waithman* v. *Wakefield*, 1 Camp. 120.

(*a*) Moo. & M. 18; *Clifford* v. *Laton*, Id. 101, 102.

(*l*) Per Lord *Abinger*, C. B., *Emmett* v. *Norton*, 8 Car. & P. 510, and in *Hardie* v. *Grant*, Id. 516; *Hunt* v. *De Blaquiere*, 5 Bing. 557, 562; Per *Bayley*, J., *Montague* v. *Benedict*, 3 B. & C. 635; Per Lord *Kenyon*, C. J., *Hodges* v. *Hodges*, 1 Esp. 441; Per Lord *Ellenborough*, C. J., 2 Stark. N. P. C. 87; *Aldis* v. *Chap-*

wife into his house, he turns her out of doors; and if he does so, he sends with her credit for her reasonable expenses"(*c*).

5. But although "the law presumes that the husband will furnish necessaries for his wife so long as she is a member of his family, and that he undertakes to pay for such necessaries;" yet "when the wife voluntarily abandons and relinquishes her family, by this conduct she renders herself incapable of enjoying the before-mentioned privilege, and places herself without the pale of her husband's maintenance; and therefore it shall not be presumed that the husband has entered into such an assumpsit in that case"(*d*). A tradesman, therefore, supplying necessaries to the wife whilst living apart from the husband against his will, could not recover from the latter (*e*), unless proof were given that he had assented to the wife's contract.

6. If the wife be living in open adultery, her husband is not bound by any contract which she may make, even for necessaries (*f*), unless there be evidence of condonation on his part, or he forgive her, and receive her back again (*g*).

The above are the principal classes of cases, likely to occur in practice, having reference to the liability of the husband

man, cited 1 Selw. N. P., 10th ed., p. 278; *Harris* v. *Morris*, 4 Esp. 41; *Houliston* v. *Smyth*, 2 Car. & P. 22; and see Bell, Husb. & W. p. 25.

(*c*) Per Lord *Eldon*, *Rawlyns* v. *Vandyke*, 3 Esp. 250. (But as to the main point, regarding the necessity of notice, there decided, see *Mizen* v. *Pick*, 3 M. & W. 481; *Dixon* v. *Hurrell*, 8 Car. & P. 717); *Reed* v. *Moore*, 5 Car. & P. 200.

(*d*) *Manby* v. *Scott* (ad finem), 2 Smith L. C. 272.

(*e*) *Hindley* v. *Marquis of Westmeath*, 6 B. & C. 200.

(*f*) Per Lord *Abinger*, C. B., *Emmett* v. *Norton*, 8 Car. & P. 510; *Hardie* v. *Grant*, Id. 512; *Gorier* v. *Hancock*, 6 T. R. 603; *Morris* v. *Martin*, Str. 647; *Mainwairing* v. *Sands*, Id. 706.

(*g*) See *Norton* v. *Fazan*, 1 B. & P. 226.

on his wife's contract for necessaries (*h*), and illustrating the nature and extent of the incapacity to contract, which, by our law, is imposed on a feme covert. We should observe, however, that although in general it is upon the ground of agency that questions as to the liability or non-liability of the baron in respect of the contracts for necessaries of the feme during coverture have been discussed, it seems clear that this matter may also be regarded from a somewhat different point of view; that the husband, on assuming such character, incurs ipso facto, at common law, certain responsibilities quoad the wife, the nature of which has been partially indicated in the preceding pages. The view of the subject before us now alluded to is thus explained by *Alderson*, B., in *Read* v. *Legard* (*i*):—By the marriage contract, says that learned Judge, the husband takes on himself the duty of supplying his wife with necessaries, that is to say, the wife is entitled to be supported according to the estate and condition of her husband. "If she is compelled by his misconduct to procure the necessary articles for herself,—as, for instance, if he drives her from his house, or brings improper persons into it, so that no respectable woman could live there,—according to the decided cases, he gives her authority to pledge his credit for her necessary maintenance elsewhere; which means, that *the law gives that authority by force of the relation of husband and wife.* So, if a husband omit to furnish his wife with necessaries while living with him, she may procure them elsewhere, otherwise she would perish."

(*h*) As to the liability of the husband for necessaries supplied to the wife when receiving alimony under a decree of the Ecclesiastical Court, see 2 Smith L. C. 286-7; Macqueen, Husb. & W. p. 143.

(*i*) 6 Exch. 636.

See also *Manby* v. *Scott*, 2 Smith L. C. 272.

And, by parity of reasoning, "if the husband becomes lunatic by the visitation of God, and therefore unable to provide his wife with necessaries, he is in the same situation as a husband omitting to furnish them; and, as by the relation which he originally contracted he undertook to provide her with them himself, he becomes liable to any person who does it for him" (*k*).

In conformity with the doctrine above laid down, a husband has been held liable for the necessary expenses attendant on the decent interment of his wife, who at the time of her death was living separate from him, although such expenses were incurred, and, in the first instance, defrayed by the plaintiff, a mere volunteer, without any prior communication with the husband. There can be no question, remarked *Jervis*, C. J., in the case here alluded to, that an undertaker who conducts a funeral may recover from the executor of the deceased (having assets) the reasonable and necessary expenses of such funeral, without any specific contract, the liability of the executor resulting from the duty imposed upon him by the character which he fills, regard being had to decency and to the comfort of others; and an equal responsibility is for the same reasons cast upon the husband of a deceased wife (*l*), such responsibility being directly referable to the character with which he is invested.

(*k*) Per *Alderson*, B., 6 Exch. 642. "The true principle seems to be, that, when a man marries, he contracts an obligation to support his wife; and, in point of law, he gives her authority to pledge his credit for her support, if circumstances render it necessary, she herself not being in fault:" per *Pollock*, C. B., Id. ibid.

(*l*) *Ambrose* v. *Kerrison*, 10 C. B. 776, recognising *Jenkins* v. *Tucker*, 1 H. Bla. 91.

Contracts of lunatics.

"A lunatic, or non compos mentis," says *Blackstone* (*m*), "is one who hath had understanding, but by disease, grief, or other accident hath lost the use of his reason." In pursuing the present inquiry, it becomes important to consider how far, by the defect of reason here pointed at, the contracts of a lunatic are rendered voidable or void.

In the first place, then, I shall speak of *executed*, and secondly of *executory* contracts by or with a lunatic. And in connection with the former of these classes, it may clearly be laid down, that a lunatic is liable for the price of *necessaries*, i. e. of goods or things suited to his state and degree, actually ordered, and enjoyed by and bonâ fide supplied to him (*n*).

With regard to the right of a lunatic, or his representatives, to rescind an executed contract entered into by him, not being for necessaries, *Molton* v. *Camroux* (*o*) must be regarded as the leading authority. There a lunatic, having purchased of a life assurance company certain annuities, and having paid the consideration money and a premium in respect thereof, an action was, after his death, brought for recovery of these monies by his administratrix, under the following state of facts, as found by the special verdict:—At the time of the granting of the annuities and payment of the consideration money aforesaid, the intestate was a lunatic and of unsound mind so as to be incompetent to manage his affairs, but of this the society had not, at that time, any knowledge; the purchases of the annuities took place in the ordinary course of business; they were fair and bonâ fide

(*m*) 1 Bla. Com. p. 304.

(*n*) *Baxter* v. *Earl of Portsmouth*, 5 B. & C. 170; *S. C.*, 2 Car. & P. 178; *Manby* v. *Scott*, 2 Smith L. C. 252-3; *Nelson* v. *Duncombe*, 9 Beav. 211. See *Read* v. *Legard*, 6 Exch. 636.

(*o*) 4 Exch. 17, affirming Judgm. in *S. C.*, 2 Exch. 487.

Quære, "whether, in the present state of the law, a conveyance executed by a lunatic is absolutely void in the absence of notice and fraud?"—Per Lord *Truro*, C., *Price* v. *Berrington*, 3 Mac. & G. 498.

transactions; the grantee then appearing to the society to be of sound mind, although he was in fact of unsound mind. All suspicion of fraud or unfairness being thus excluded, the question was, by the special verdict above abstracted, broadly raised—whether the mere fact of unsoundness of mind, not apparent at the time of the contract in question, was sufficient to vacate it, albeit executed by the grantee by payment of the consideration money, and intended bonâ fide to be executed by the grantor by payment of the annuity. In deciding this question, the Court of Exchequer Chamber made the following remarks (*p*):—"The old doctrine was, that a man could not set up his own lunacy, though such as that he did not know what he was about in contracting (*q*); and the same doctrine was applied to drunkenness (*r*). It is true that there are some exceptions in the old authorities, and the doctrine is not laid down uniformly with perfect distinctness; but, in general, it was as above stated. Modern cases have qualified it and enabled a man or his representatives to shew that he was so lunatic or drunk as not to know what he was about when he made a promise or sealed an instrument. This special verdict hardly shews any such state of mind; but, even if it did, the modern cases shew that when that state of mind was unknown to the other contracting party, and no advantage was taken of the lunatic, the defence cannot prevail, especially where the contract is not merely executory, but executed in the whole or in part, and the parties cannot be restored altogether to their original position." The principle deducible from the above case may be thus stated, that, "when a person, apparently of sound mind and not known to be otherwise, enters into a contract for the purchase of property which is fair and bonâ fide, and which is executed and completed,

(*p*) 4 Exch. 19. (*q*) See *Beverley's case*, 4 Rep. 123 b; Co. Litt. 247. b. (*r*) Post.

and the property, the subject-matter of the contract, has been paid for and fully enjoyed, and cannot be restored so as to put the parties in statu quo, such contract cannot afterwards be set aside, either by the alleged lunatic or those who represent him" (*s*).

Notwithstanding what has been just said, it seems clear that a man by bare execution of an instrument under seal does not make it his deed, if at the time he was so weak in mind as to be incapable of understanding it when explained to him (*t*); but a deed executed by a lunatic during a lucid interval will bind him, provided that the party claiming under the deed can prove that it was so executed (*u*). Imbecility of mind, moreover, is not sufficient to render void a contract, unless an essential privation of the reasoning faculties or an incapacity of understanding and acting with discretion in the ordinary affairs of life thence results. And such incapacity has been said to afford the true test of that

(*s*) Judgm., 2 Exch. 503; with which acc. *Beavan* v. *M'Donnell*, 9 Exch. 309.

See also *Dane* v. *Kirkwall*, 8 Car. & P. 679; *Brown* v. *Jodrell*, 3 Car. & P. 30; *Niell* v. *Morley*, 9 Ves. 478; *Alcock* v. *Alcock*, 3 Mac. & G. 268; *Frost* v. *Beavan*, 22 L. J., Chanc., 638; *Tarbuck* v. *Bispham*, 2 M. & W. 2.

Where an action is brought to recover money paid under a contract, on the ground of the plaintiff's lunacy, and the issue is, whether, at the time of the particular transaction, the fact of the plaintiff's insanity was *known to the defendant*, evidence will be admissible of the plaintiff's conduct upon various occasions both before and after the date of the particular transaction, with a view to shewing that the plaintiff's malady was of such a kind as would make itself apparent to the defendant at the time when the parties were dealing together: *Beavan* v. *M'Donnell*, 10 Exch. 184.

(*t*) Shelf. Lunatics, 2nd ed., p. 338; Per Lord *Brougham*, C., *Howard* v. *Digby*, 2 Cl. & F. 661.

(*u*) Shelf. Lunatics, 2nd ed., p. 340. "All acts done *during a lucid interval* are to be considered done by a person perfectly capable of contracting, managing, and disposing of his affairs at that period:" Per Sir *W. Grant*, M. R., *Hall* v. *Warren*, 9 Ves. 610.

degree of unsoundness of mind which will avoid a deed at law. The law cannot undertake to measure the validity of contracts by the greater or less strength of the understanding, and if the party be compos mentis the mere weakness of his mental powers does not incapacitate him. Weakness of understanding may, however, be a material circumstance in establishing an inference of unfair practice or imposition, and it will naturally awaken the attention of a Court of Justice to every unfavourable appearance in the case (*v*).

The reasoning, which applies to an *executed*, does not seem altogether applicable to an *executory* contract by a lunatic (*x*)—especially where notice of the lunacy is given before breach.

Intoxication—its effect on contracts.

Although, formerly, the intoxication of a contracting party was held to afford no ground for repudiating liability upon a contract (*y*), made by him whilst in that state, the established modern doctrine seems to be, that a person who has contracted, even by deed (*z*), whilst so wholly intoxicated as to be deprived of his reason—as not to know the consequences of his act—may successfully dispute his liability in respect of such transaction (*a*).

With regard, however, to simple contracts which it is sought to avoid on the ground of intoxication, a distinction has been intimated between *express* and *implied* contracts. Where the right of action is founded upon a specific dis-

(*v*) Kent's Com., 7th ed., vol. 2, p. 564.

(*x*) Ante, p. 610; Per *Abbot* C. J., 5 B. & C. 172; Argument 9 Exch. 311.

(*y*) *Beverley's case*, 4 Rep. 125 a; 2 Kent's Com., 7th ed., vol. 2, p. 563; Per *Parke*, B., 13 M. & W. 626; Co. Litt. 247. a.

(*z*) Per Sir *W. Grant*, M. R., *Cooke* v. *Cluyworth*, 18 Ves. 15, 16; followed by Sir *E. Sugden*, in *Nagle* v. *Baylor*, 3 Dr. & W. 64, 65; *Shaw* v. *Thackray*, 17 Jur. 1045.

(*a*) *Gore* v. *Gibson*, 13 M. & W. 623, is the leading recent authority, at common law, in regard to the subject discussed supra.

tinct contract, requiring the assent of both parties, and one of them is incapable of assenting, in such a case, it has been said (*b*), there can be no binding contract; "but in many cases the law does not require an actual agreement between the parties, but implies a contract from the circumstances; in fact, the law itself makes the contract for the parties. Thus, in actions for money had and received to the plaintiff's use, or money paid by him to the defendant's use, the action may lie against the defendant, even though he may have protested against such a contract." And it seems clear, that a tradesman who supplies a drunken man with necessaries, may in like manner recover the price of them, if the party keeps them when he becomes sober; although a count for goods bargained and sold would fail by reason of the defendant's intoxication at the time of contracting (*b*). It will further be remembered, that actual fraud might plainly be evidenced by the conduct of a person taking an obligation from one intoxicated and then known by the contractee to be so (*c*).

A state of partial intoxication merely—less in degree than that just indicated—would seem, however, in the absence of fraud and unfair dealing, to afford no defence whatever to an action founded upon contract (*d*).

Besides the various grounds of incapacity to contract, already mentioned, some others occasionally present themselves, to which, as being of little practical importance, a brief allusion will suffice. The capacity to contract may in legal contemplation be wholly destroyed by *duress* (*e*), Duress.

(*b*) Per *Pollock*, C. B., 13 M. & W. 625–6.

(*c*) *Levy* v. *Baker*, Moo. & M. 106, n. (*b*); Per *Parke*, B., 13 M. & W. 626. See *Sentance* v. *Poole*, 3 Car. & P. 1.

(*d*) See the authorities cited, ante, p. 612, n. (*z*); Per *Parke*, B., 13 M. & W. 624, 626.

(*e*) For, nil consensui tam contra-

which may be of one or other of two kinds: duress *per minas*, i. e. coercion imposed by fear of loss of life or limb, or duress of imprisonment, where a man actually loses his liberty (*f*). With reference to this latter kind of duress *Blackstone* tells us (*g*), that "the confinement of the person, in any wise, is an imprisonment. So that the keeping a man against his will in a private house, putting him in the stocks, arresting or forcibly detaining him in the street, is an imprisonment. And the law so much discourages unlawful confinement, that, if a man is under duress of imprisonment or compulsion by an illegal restraint of liberty, and he seals a bond or the like, he may allege this duress and avoid the extorted bond. But if a man be lawfully imprisoned, and, either to procure his discharge or on any other fair account, seals a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it." There can be no doubt that duress of the *person*, whether evidenced by threats or by imprisonment, will nullify a contract executed under its pressure (*h*), and that money paid in pursuance of such contract may be recovered back (*i*). It may, however, be considered as doubtful whether duress of *goods* would suffice to avoid a contract—whether, if the signature to an agreement were procured by a threat of detention of a person's goods, or of injury to them, the agreement thus signed could be repudiated by the party so coerced. There are American authorities and dicta (*k*) in

rium est quam vis atque metus: D. 50. 17. 116.

(*f*) 1 Bla. Com. 131; post, Book III.

(*g*) 1 Bla. Com. 136.

(*h*) Supra; and see *Cumming* v. *Ince*, 11 Q. B. 112.

(*i*) *Duke de Cudaval* v. *Collins*, 4 Ad. & E. 858, and cases cited in 2 Smith L. C., p. 240, *c*.

(*k*) Kent, Com., 7th edit., vol. 2, p. 565, n. (*c*).

support of an affirmative answer to this question, but in our own Courts the weight of direct authority is somewhat the other way (*l*).

Incapacity of alien enemy or outlaw to contract.

The following additional grounds of incapacity to contract should also, perhaps, be specified, presenting themselves, 1. in the case of an alien enemy, who, unless duly authorised by the Crown (*m*), is, from considerations of expedience and public policy, deemed incapable of entering into a valid contract (*n*); 2. in the case of an outlaw, who, whilst civilly dead, is under certain circumstances (*o*) equally incompetent to contract; 3. in the case of an attainted felon (*p*). In either of the cases here mentioned, however, the disability flowing from the cause indicated seems to be partial only. It is laid down that an alien enemy or an outlaw may be sued in our Courts upon contracts here entered into by him (*q*).

(*l*) *Skeate* v. *Beale*, 11 Ad. & E. 983, 990, (with which, however, compare *Wakefield* v. *Newbon*, 6 Q. B. 276, 280; the authorities there cited seem to shew, that "money extorted by duress of the plaintiff's goods, and paid by the plaintiff under protest, may be recovered in an action for money had and received.") See also per *Coleridge*, J., *Ashmole* v. *Wainwright*, 2 Q. B. 846.

(*m*) See *Fenton* v. *Pearson*, 15 East, 418; 7 & 8 Vict. c. 66, s. 6.

(*n*) Co. Litt. 129. b.; *Willison* v. *Pattison*, 7 Taunt. 439; *Brandon* v. *Nesbitt*, 6 T. R. 23; *Bristow* v. *Towers*, Id. 35; *Brandon* v. *Curling*, 4 East, 410; Per Lord *Ellenborough*, C. J., *Flindt* v. *Waters*, 15 East, 265-6; *Casseres* v. *Bell*, 8 T. R. 166. See a plea that plaintiff has become an alien enemy since the cause of action accrued. *Alcenius* v. *Nygren*, 24 L. J., Q. B., 19.

(*o*) The class of cases in which an absolute incapacity to contract may result from outlawry, is pointed out in Co. Litt. 128. b., where it is said, that—If the ground or cause of the action be forfeited by the outlawry, then may the outlawry be pleaded in bar of the action, as in an action of debt, detinue, &c. But in real actions, or in personal, where damages be uncertain, as in trespass, and are not forfeited by the outlawry, there outlawry must be pleaded in disability of the person.

(*p*) *Bullock* v. *Dodds*, 2 B. & Ald. 258.

(*q*) *Loukes* v. *Holbeach*, 4 Bing. 419, 421; *Ramsay* v. *M'Donald*, 1 W. Bl. 30; *Banyster* v. *Trussel*, Cro. Eliz. 516; Com. Dig. "Abatement," (E. 3.); *Griffith* v. *Middleton*, Cro. Eliz. 425, ad fin.

Contracts of executors and administrators.

Whilst speaking of the capacity to contract, some remarks must be directed to the peculiar position occupied by an executor or administrator, who, under certain circumstances, may contract in that character so as to charge or benefit the estate which he administers, entailing thereby no personal liability upon and securing no possibility of advantage to himself—under another state of facts may find that he is individually answerable in respect of a contract made or intended to be made by him in relation solely to the assets of his testator or intestate.

The question—under what circumstances may a personal representative properly contract in that character? is one of manifest importance; to which, however, justice cannot be done by brief discussion. In regard to it reference must be had to standard Treatises and to decided cases—of these latter, some only of the more recent or important will here be indicated to the student.

An executor, it will be remembered, derives his interest and title as such from the will itself, of which the probate is merely operative as the authenticated evidence (*r*). The property of the deceased vests in the executor from the moment of the testator's death, and to that date the probate is said to have relation (*r*). An executor, therefore, may in that character validly contract immediately after the death of the testator has occurred.

An administrator, on the other hand, derives title from the letters of administration, such title, however, relating back to the date of the intestate's decease (*s*). By virtue of

(*r*) 1 Wms. Exors., 4th edit., p. 239; *Hensloe's case*, 9 Rep. 38 a; Judgment, *Cummins* v. *Cummins*, 3 J. & L. 92-3; Roll. Abr. "Executors" (A.), (vol. 1, p. 917), cited Judgm., *Easton* v. *Carter*, 5 Exch. 14; *Wankford* v. *Wankford*, 1 Salk. 302, 303; *Webb* v. *Adkins*, 14 C. B. 401, 406.

(*s*) See *Crosafield* v. *Such*, 8 Exch. 825; *Morgan* v. *Thomas*, Id. 302; Per *Parke*, B., *Yorston* v. *Fether*, 14 M. & W. 854; *Bodger* v. *Arch*, 10 Exch. 333.

this doctrine of relation, an administrator, on becoming duly clothed with that character, will sometimes find that he is in legal contemplation constituted party to a contract antecedently made, and is entitled to sue, or liable to be sued, in autre droit, thereupon. Thus, A., having sent goods to his agent abroad for sale, died intestate, and after A.'s death the defendants purchased the goods from the agent, who sold them for the benefit of the intestate's estate. Subsequently to the sale, the plaintiff took out letters of administration to the intestate, and then sued the defendants for the price of the goods in question; the action thus brought was held to be maintainable, in conformity with the doctrine of relation above stated, and with the rule of law, that, when one assumes to act as agent for another, a subsequent ratification by that other is tantamount to a prior command (*t*). So, where money belonging to an intestate at the time of his death, or due to him and paid in after his death, has, before grant of administration, been applied by a stranger to the payment of the intestate's debts and funeral expenses, the administrator may recover it from such stranger as money had and received to his use as administrator (*u*).

Without pausing to inquire what rights of action, vested in the deceased, do or do not pass to his personal representatives, (an inquiry which could throw no direct light upon their capacity to contract in autre droit,) the general rule, at all events, is here deserving of our notice, that executors or administrators may be regarded as contracting in that character, wherever the damages recoverable for breach of

(*t*) *Foster* v. *Bates*, 12 M. & W. 226; *Tharpe* v. *Stallwood*, 5 M. & Gr. 760; *Fyson* v. *Chambers*, 9 M. & W. 460.

(*u*) *Welchman* v. *Sturgis*, 13 Q. B. 552. See *Vaughan* v. *Matthews*, Id. 187.

the particular contract would be available to increase or would go to diminish (as the case may be) the personal estate of the deceased (*v*). Where goods are ordered of the deceased in his lifetime, but delivered subsequently to his death (*x*), the contract to pay for them may be declared upon as having been made with the personal representatives. If a party contract for himself and his executors to build a house, and die before it is completed, the executors must proceed with the work, at the risk of being held responsible, quà executors, for breach of contract (*y*), and if they thus proceed, the work and labour will be done by them as executors, they may recover for it as executors, and the damages so recovered will be assets in their hands (*z*). If, however, money be lent to or had and received by an executor or administrator (*a*), or if work and labour be performed for, or goods be sold and delivered to him (*b*), the personal representative will be held to have contracted in his individual character, and will be personally liable.

(*v*) *Cowell* v. *Watts*, 6 East, 405; Judgm., *Heath* v. *Chilton*, 12 M. & W. 637; *Webb* v. *Cowdell*, 14 M. & W. 820; *Grissell* v. *Robinson*, 3 Bing. N. C. 10; *Webster* v. *Spencer*, 3 B. & Ald. 360.

(*x*) *Marshall* v. *Broadhurst*, 1 Cr. & J. 403, 405, recognised per *Parke*, B., 2 M. & W. 191; *Werner* v. *Humphreys*, 2 M. & Gr. 853.

(*y*) *Quick* v. *Ludborrow*, 3 Bulst. 30, recognised 1 M. & W. 423; Per Lord *Abinger*, C. B., *Corner* v. *Shew*, 3 M. & W. 353, 354; *Wentworth* v. *Cock*, 10 Ad. & E. 42; *Aspinall* v. *Wake*, 10 Bing. 51.

(*z*) Per Cur., *Marshall* v. *Broadhurst*, 1 Cr. & J. 405; *Edwards* v. *Grace*, 2 M. & W. 190; Per Lord *Abinger*, C. B., *Siboni* v. *Kirkman*, 1 M. & W. 422. See *Crosthwaite* v. *Gardner*, 21 L. J., Q. B, 356.

(*a*) *Ashby* v. *Ashby*, 7 B. & C. 444; *Waite* v. *Gale*, 2 D. & L. 925.

See *Blakesley* v. *Smallwood*, 8 Q. B. 538; *Mardall* v. *Thellusson*, 21 L. J., Q. B., 410; *Watts* v. *Rees*, 9 Exch. 696; *Churchill* v. *Bertrand*, 3 Q. B. 568.

(*b*) *Corner* v. *Shew*, 3 M. & W. 350; *Kitchenman* v. *Skeel*, 3 Exch. 49. See *Prior* v. *Hembrow*, 8 M. & W. 873.

So, if B. (an executor) request A. to forbear suing him in respect of a debt due from the testator, and promise to pay interest thereupon, such promise will evidence a *personal* contract with B. To make him liable for interest as executor, a contract must be shewn *by the testator* to pay interest so long as the debt should be forborne (*c*).

A. contracted with the plaintiff that plaintiff should endeavour to sell a picture belonging to A., and that, if he succeeded in doing so, A. should pay him 100*l.* The plaintiff, in pursuance of this agreement, endeavoured to sell the picture, and after A.'s death actually disposed of it, which sale was (as alleged in the declaration) confirmed by the defendant, his administratrix. From this latter party, accordingly, the plaintiff claimed the 100*l.* as due to him, by virtue of the agreement just mentioned. It was held, however, that the defendant would not, by merely confirming the sale, render herself liable on the original contract, the authority conferred by which on the plaintiff was determined by the death of A., although, if on the happening of that event the administratrix had ordered the sale, that would clearly have evidenced a fresh employment by her of the plaintiff, and have rendered her liable to remunerate him for his services in effecting it (*d*). This case shews us that the true nature of the particular contract, in respect whereof it is sought to charge a personal representative in that character, must, before suing upon it, be carefully and critically examined (*e*).

(*c*) *Bignell* v. *Harpur*, 4 Exch. 773, 775; *Childs* v. *Monins*, 2 B. & B. 460; infra, n. (*e*).

(*d*) *Campanari* v. *Woodburn*, 24 L. J., C. P., 13.

(*e*) We have already seen (ante, p. 387) that, in order to charge an executor or administrator upon any special promise to answer damages out of his own estate, the agreement on which such action shall be brought, or some memorandum or

In cases such as I have just specified—where one of the contracting parties is invested with a twofold character, his private and his representative—the effect on his capacity to contract, thence resulting, is not so marked or easily traceable, as in some of the other instances to which I have previously adverted. That such an effect is produced thereby, must, however be admitted, and is not the less true, because in some cases it may be a pure question of fact and for the jury, in what character executors or administrators did really contract (*f*). With reference to that part of the subject immediately before us, I will merely add, that the power of an executor being founded upon the special confidence and actual appointment of the deceased, the executor is therefore allowed to transmit such power to another in whom he has equal confidence. Consequently, the executor of A.'s executor, if the latter has proved the will (*g*), is to all intents and purposes the executor and representative of A. himself, and may accordingly, in like manner as the executor originally appointed, contract for the benefit of A.'s estate (*h*). The executor of A.'s administrator, or the administrator of A.'s executor, is not, however, the representative of A.; for an administrator is merely the officer of the ordinary, prescribed to him by Act of Parliament (*i*),

note thereof shall be in writing, and signed by the party to be charged, or some other person thereunto by him lawfully authorised.

Owing to the community of interest subsisting between executors or administrators, they are precluded from contracting with each other in such character: *Moffatt* v. *Van Millengen*, 2 B. & P. 124, n. (*c*); recognised in *Fitzgerald* v. *Boehm*, 6 Moore, 332; argument, *Rawlinson* v. *Shaw*, 3 T. R. 558.

(*f*) *Heath* v. *Chilton*, 12 M. & W. 632; *Brassington* v. *Ault*, 2 Bing. 177; *Turner* v. *Hardey*, 9 M. & W. 770.

(*g*) *Hayton* v. *Wolfe*, Cro. Jac. 614; *Wankford* v. *Wankford*, 1 Salk. 308, 309.

(*h*) 25 Edw. 3, st. 5, c. 5.

(*i*) 31 Edw. 3, st. 1, c. 11.

in whom the deceased has reposed no trust at all (*k*). Hence it is, that, on the death of A.'s administrator, or of A.'s executor, if intestate, or whenever the course of representation from executor to executor is interrupted by any one administration, it is necessary that an administrator de bonis non should be appointed, who will thereupon become, in law, the sole personal representative of A., and will alone be entitled to contract in respect of his personal estate (*l*).

Effect of insolvency on the capacity to contract.

The general effect of insolvency upon the capacity to contract is very similar to that of bankruptcy. The truth of this remark will be recognised on taking, by aid of the references below given, a brief survey of the leading provisions of the principal Acts now in force for the relief of insolvent debtors, viz. the stats. 1 & 2 Vict. c. 110 (*m*), 5 & 6

(*k*) 2 Bla. Com. 506.

(*l*) 2 Bla. Com. 506; *Elliott* v. *Kemp*, 7 M. & W. 306; *Venables* v. *East India Company*, 2 Exch. 633.

(*m*) The vesting order of the Court for the Relief of Insolvent Debtors, under the stat. 1 & 2 Vict. c. 110, s. 37, from the date of the order, transfers to the provisional assignee, on his acceptance of the appointment, without any conveyance or assignment thereof, all the real and personal estate of the insolvent (except wearing apparel, working tools, and other such necessaries, not exceeding in value 20*l*.); and all his future estate, right, title, interest, and trust, in or to any real and personal estate and effects within this realm or abroad, which he may acquire before becoming entitled to his final discharge in pursuance of the Act; and also all debts due or growing due or to be due to such prisoner, before such discharge; and sect. 42 empowers the provisional assignee to sue in his own name, if the Court shall so order, for the recovering, obtaining, and enforcing of any estates, debts, effects, or rights of the insolvent.

As to the effect of the 37th section of the Act above mentioned, see *Yorke* v. *Brown*, 10 M. & W. 78; *Tucker* v. *Webster*, Id. 371; *Ford* v. *Dabbs*, 5 M. & Gr. 309; *Yorston* v. *Fether*, 14 M. & W. 851; *Wickens* v. *Goatley*, 11 C. B. 666.

As to the effect of the 37th and 44th sections (which latter applies where no adjudication is made, or where the vesting order is avoided), see *Kernot* v. *Pittis*, 2 E. & B. 406.

As to sect. 91, which entitles a

Vict. c. 116 (*n*), and 7 & 8 Vict. c. 96. In the first place, I may observe, that the rule laid down in *Herbert* v. *Sayer* (*o*), with reference to the general capacity of a bankrupt to contract whilst uncertificated, subject to the right of his assignees to interfere and sue upon the contract, was, in *Jackson* v. *Burnham* (*p*), applied to the case of an insolvent, who, having taken the benefit of the stat. 1 & 2 Vict. c. 110, was held entitled to sue for a debt which accrued to him after the vesting order and before his final discharge, unless the provisional assignee interfered and claimed the

discharged insolvent to plead his discharge in answer to an action brought upon any new security for payment of a debt in respect of which he has been discharged, see *Humphries* v. *Smith*, 22 L. J., Q. B., 121. See also *Hall* v. *Dyson*, 17 Q. B. 785, and cases cited Broom's Pract. vol. 1, p. 527, n. (*f*).

But, although the general effect of insolvency, with reference to the choice of proper plaintiffs, is, that all rights of action ex contractu, vested in the insolvent previous to the petition and vesting order, are absolutely barred by the assignment—per *Littledale*, J., *Swann* v. *Sutton*, 10 A. & E. 631; yet, where a bond or debt has been assigned by the insolvent before his insolvency, and notice thereof given to the debtor, any action for recovery of the debt so assigned must be brought in the name of the insolvent as trustee for the assignee: *Buck* v. *Lee*, 1 Ad. & E. 804; *Tibbits* v. *George*, 5 Ad. & E. 107; *Sims* v. *Thomas* and *Strachan* v. *Thomas*, 12 Ad. & E. 536; *Boyd* v. *Mangles*, 3 Exch. 387; *D'Arnay* v. *Chemeau*, 13 M. & W. 796, where the prior cases are reviewed.

(*n*) The stat. 5 & 6 Vict. c. 116, intituled "An Act for the Relief of Insolvent Debtors," applies to the case of a person not being a trader within the meaning of the Bankrupt Acts, or being such trader but owing debts amounting in the whole to less than 300*l*. This Act was amended by the 7 & 8 Vict. c. 96. From various provisions of these two statutes, we collect that the legislature intended that *all* the insolvent's creditors should be named in his schedule, and should be exactly on the same footing,—that all his effects,—those *before* the final order absolutely, those *after* such final order sub modo,—should be applied to their common benefit, and then that the insolvent should be a free man: Judgt., *Wilkin* v. *Manning*, 9 Exch. 581-2. See also *Sayer* v. *Dufaur*, 11 Q. B. 325; *Beavan* v. *Walker*, 12 C. B. 480.

(*o*) 5 Q. B. 965, cited ante, p. 580.

(*p*) 8 Exch. 173. See *Ford* v. *Dabbs*, 5 M. & Gr. 309.

debt. The rule in question, however, has always been confined to cases of after-acquired property. Property belonging to the insolvent *before* the date of the vesting order is by it taken out of him, and transferred to his provisional assignee, so that no right of action in respect of it remains in the insolvent (*q*).

The insolvent's assignee, however, cannot sue for a debt which has accrued in respect of the personal labour of the insolvent before his final discharge; in other words, he cannot let the insolvent out to hire and sue for the price of his labour as upon a contract made with himself (*r*); a decision which is in accordance with the doctrine laid down at p. 581, as applicable to an uncertificated bankrupt.

In further accordance with the decisions under the Bankrupt Acts, it has been held, that a cause of action which touches only the person of the insolvent, and for which he would be entitled to a remedy whether his property were diminished or impaired or not, does not pass to his assignees; and, in respect of any such matter, the bankrupt, therefore, whilst uncertificated, may contract. One count of a declaration against attornies for negligence alleged, that in consequence thereof a judgment was obtained against the plaintiff, and that under it he was brought into the Court of Exchequer by virtue of a writ of habeas corpus ad satisfaciendum, and was remanded to the Queen's prison, charged with the amount for which such judgment had been obtained. The count in question was held to disclose a personal wrong, for which the insolvent would

(*q*) Per Lord *Campbell*, C. J., *Stanton* v. *Collier*, 24 L. J., Q. B., 116, 119; *S. C.* 3 E. & B. 274.

(*r*) *Williams* v. *Chambers*, 10 Q. B. 337.

be entitled to a remedy, irrespectively of pecuniary loss resulting from it; the right of action for such wrong was, consequently, held not to pass to the assignee (*s*).

Where, however, pecuniary loss or damage is the substantial and primary cause of action, the right to sue in respect of it does pass to the assignee, although such pecuniary loss may produce inconvenience to the insolvent. A., a beneficed clergyman, brought an action on the case against his attornies for having, through their negligence and want of skill, permitted a writ of sequestrari facias to remain in force against him longer than was necessary, whereby A., during that time, lost the rent, tithes, and profits of his living. The cause of action here disclosed was held to touch the estate of the insolvent, and to pass, therefore, to his assignee (*s*). Again, an action was brought for breach of a contract to redeliver to the plaintiff a printing machine, which had been deposited with the defendants as a security, in consideration of their withdrawing an execution issued against him, *per quod* the plaintiff lost gains and profits which would have accrued to him from the use of the said printing machine, and his whole business and trade were injured and stopped, and he became insolvent, and incurred great expense. It was held, that the damage thus alleged affected the personal estate of the plaintiff, and gave a right of action to his assignee (*t*).

Resumé of matters—treated of in this Chapter.

The remarks made in the preceding chapter have been meant as suggestive only in regard to the effects produced on the capacity to contract by various ordinary mercantile relations, or by the incidents attaching to certain persons

(*s*) *Wetherell* v. *Julius*, 10 C. B. 267.

(*t*) *Stanton* v. *Collier*, 3 E. & B. 274.

non-mercantile. A brief resumé of the principal subjects touched upon in the foregoing pages may assist perhaps towards rendering distinct the results at which we have arrived, and shew the general bearing of what has been now said upon the point which it was intended to elucidate.

In the first place, then, it will have been noticed that the relation of principal and agent rarely so operates in practice as to render wholly nugatory a contract apparently binding on *some* party. Where this relation exists, the question usually is rather as to the liability of the principal for the act of a professing agent, or as to the liability of the agent himself, that of the principal being admitted, than of any other kind: such question, of course, requiring for its solution a reference to those doctrines of the law of agency which may seem applicable to the given case (*u*).

Where the relation of partnership exists between individuals, they are, *as between themselves*, in many cases wholly incapacitated from contracting by reason of the unity and identity of interest (partners being joint tenants) which subsists between them. In regard to third persons, however, the relation of partnership usually introduces questions similar to those which present themselves in connexion with the law of agency. Such, for instance, as whether in any particular case the firm is bound, or the individual partner who contracted, no doubt or difficulty arising as to the capacity to contract (*x*).

On inquiring into the attributes of a corporation, we are at once struck by the fact, that it can in general contract only under its common seal: exceptions to this rule sometimes occurring—1st, where the subject-matter of a contract

(*u*) Ante, pp. 534–554. (*x*) Ante, pp. 556, 559, 564.

is necessary, and incidental to the purposes for which the corporation was created; 2ndly, where it is trivial in its nature; 3rdly, where it has been adopted and acted upon by the corporation; and, 4thly, where it falls within the express words of the statute, charter, or letters patent, by virtue of which the body corporate was constituted (*z*).

It might readily be surmised, that the absolute assignment of property effected by bankruptcy would have some material influence upon the bankrupt's capacity to contract. And, accordingly, an uncertificated bankrupt assuming to contract on his own behalf will often find that, by force of our bankrupt law, he has in fact contracted as an agent merely for his assignees. And, further, in some few cases he may find that his contracts duly authenticated and primâ facie valid are avoided in toto by the express words of the Legislature (*a*). And the remarks here made will be found generally applicable also to the case of an insolvent (*b*).

Amongst disabilities attaching to persons non-mercantile, the effect of infancy on the capacity to contract has first been noticed. I have shewn that difficulty may occur in distinguishing between *void* and *voidable* contracts—between those which are not and those which are capable of being ratified and confirmed by the infant on attaining his full age—contracts prejudicial to the infant—especially when under seal—being deemed absolutely void; whilst contracts not necessarily or presumably prejudicial to him are susceptible of ratification. We have seen also what is the true meaning of the term 'necessaries,' and that our law, out of regard for the infant, allows him to contract effectually for such things (*c*).

(*z*) Ante, pp. 568—578.
(*a*) Ante, pp. 578 et seq.
(*b*) Ante, pp. 621, 622.
(*c*) Ante, pp. 587, 591.

The extent or degree of the disability to contract, produced by coverture, is greater than that which results from infancy; the contract of a married woman is in most cases absolutely void, and wholly incapable of being ratified—an express promise even by her after her husband's death to pay a debt incurred during coverture, being without consideration and void. Questions, therefore, in regard to the contracts of married women usually concern the liability of the husband rather than of the wife—they raise discussion as to the fact of the wife's *agency*, express or implied, rather than as to the existence of a positive power to contract as *principal* being vested in her (*d*).

The effect of mental imbecility upon the contract of one labouring under it has, further, been examined, and a distinction has here been pointed out between executed and executory contracts: the former, if fair and bonâ fide, being in general unimpeachable on the ground of lunacy; whilst the latter, it seems, could not be enforced against the lunatic. One who is non compos mentis, and known to be so, may, however, contract for things necessary for his subsistence, or suited to the station of life in which he moves (*e*).

Lastly, we have seen, that, where an individual clothed with a representative character enters into a contract, although doubt may often be felt respecting the character in which he contracted, his capacity to contract will not in general come in question (*f*).

(*d*) Ante, pp. 597, 601. (*e*) Ante, p. 609. (*f*) Ante, pp. 616, 620.

CHAPTER VI.

ON THE MEASURE OF DAMAGES—IN ACTIONS OF CONTRACT (*a*).

If a contract be submitted to the notice of a pleader, with a view to commencing an action upon it, he will, in the first instance, inquire whether the contract be of *record*, *special*, or *simple*. If of *record*, i. e. founded on a judgment or recognisance (*b*), he will at once conclude that the remedy by action must be in debt. If the contract be *special*, i. e. founded on a deed or instrument under seal (*c*), he will conclude that the remedy will be either in debt or covenant, according to circumstances. If the contract be *simple*, i. e. in writing not under seal, or oral (*d*), he may infer that the remedy will probably be in debt or assumpsit, and he will at once proceed to examine whether the various requisites to a valid simple contract are present in the case before him. He will observe, whether the terms of the agreement (if such be the ground of action) have been definitively arranged and settled, remembering that, upon one which is inchoate merely and incomplete, no legal remedy can be enforced (*e*). He will observe whether there has been rèciprocity of assent between the contracting parties (*f*), whether there has been a consideration moving

(*a*) In connection with this Chapter should be read the corresponding portion of the next Book, intituled "On the Measure of Damages—in Actions of Tort."

An attempt has above been made to exhibit the rules applicable in *ordinary* cases only for the assessment of damages.

(*b*) Ante, p. 268.

(*c*) Ante, p. 273.

(*d*) Ante, p. 308.

(*e*) Ante, p. 308.

(*f*) Ante, p. 310.

from one to the other (*g*), and privity (*h*) between them. Should he find that the promise was not without consideration, he may still have to determine whether the consideration was good and sufficient, or was on any ground invalid (*i*); whether it was past and executed, and such as *could* not support the subsequent promise (*k*); whether it was illegal, as contravening the statute law or any principle of public policy (*l*); whether it was founded in *fraud* (*m*), or was altogether illusory (*n*). And, should he satisfy himself on all these points, ascertain also that the legal capacity to contract is unaffected (*o*), and conceive that a right of action in truth exists and will be enforceable, he may still, on behalf of his client, deem it expedient to inquire what will probably, in the event of success, be the amount of compensation to be awarded by the jury. Will it be *substantial* or *nominal* only? Is it, in short, *worth while* for the complainant (regard being had to all the facts submitted) to incur the anxiety of litigation, to risk the chance of defeat, with the penalty consequent thereupon in the shape of costs, whilst in pursuit of a favourable verdict, and the *damages* which are to crown it? This is a question of much importance, although too little regarded by the practitioner; a partial solution of it will therefore be attempted in the present chapter.

The term "*damages*" will here be used to signify a pecuniary compensation for a wrong or injury inflicted by one person on another, recoverable by action (*p*). The ex-

(*g*) Ante, p. 322.
(*h*) Ante, p. 323.
(*i*) Ante, pp. 323, 357.
(*k*) Ante, pp. 332—337.
(*l*) Ante, p. 357.
(*m*) Ante, p. 341.
(*n*) Ante, p. 325.
(*o*) Ante, Chap. v.
(*p*) Bac. Abr. "Damages;" Co. Litt. 257. a.; 2 Bla. Com. 438; Sayer on Damages, p. 1. Under the word "wrong," above used, may be included "breach of contract."

pression "*measure of damages*," will be used as synonymous with the 'scale' or 'rule' by reference to which damages are in any given case to be assessed; for although, on an ordinary trial at Nisi Prius, the act of finding the damages is always for the jury, there are, nevertheless, certain established and recognised rules, according to which, under particular circumstances, the jury ought to find (*q*).

In the first place, it holds generally true, as we have already had occasion to notice (*r*), that, in an action for breach of contract, the intention or motive of the party charged cannot be inquired into, and indeed will be irrelevant to the issue. In such an action the main questions for determination will be, What was the contract? Was it broken by the defendant? If the terms of the contract be ascertained, and its breach be proved, the only other inquiry will be as to the *amount of damages to be awarded;* and, in estimating these damages, the motive or intention of the defendant will be immaterial. The good of society requires that contracts mutually assented to should be inviolably observed and strictly executed (*s*). If a man expressly covenants or on proper consideration promises to do an act which he would not otherwise be bound by law to perform, he, by his own deliberate act, imposes on himself a responsibility from which he cannot be relieved unless by consent of the contractee, and, if guilty of a breach of his covenant or promise, is at law compellable to make compensation in damages to the party injured (*s*). Our law, it has been remarked (*t*), makes a broad distinction, in regard to the proper measure of compensation to be awarded

(*q*) Per *Pollock*, C. B., *Alder* v. *Keighley*, 15 M. & W. 120.

(*r*) Ante, p. 76.

(*s*) Platt on Covenants, pp. 25-6.

(*t*) By Mr. Sedgwick in his excellent Treatise on the Measure of Damages, 2nd ed., p. 204.

to a plaintiff, between actions of contract and actions of tort; and, while it permits the jury in the latter case to take into consideration the intention of the offending party, to review all the circumstances of the case, and to apportion the damages accordingly, thus to some extent causing the verdict to operate as a medium for punishment as well as compensation (*u*), yet, in actions of contract, the motive or animus of the defendant is, in general, entirely disregarded, and the damages are strictly limited to the pecuniary loss resulting from the breach of contract (*v*). Such is the rule applicable in most actions of contract, though sometimes,—ex. gr. in assumpsit for breach of promise of marriage,—a jury will assume to themselves a very wide latitude and discretion (*x*)—will assume to punish the defendant, as well as to compensate the plaintiff.

It follows directly from what has been above said, that, for a bare breach of contract, *nominal* damages, *at all events* (*y*), will be recoverable (*z*); and further, that, where an agree-

(*u*) Post, Book III.

(*v*) The abstract rules for the assessment of damages do not seem to be anywise affected by the 15 & 16 Vict. c. 76, s. 41, which allows the joinder of different causes of action in the same suit.

(*x*) Sedgw. Dams., 2nd ed., p. 210.

(*y*) See *Hey* v. *Wyche*, 2 G. & D. 569; *Rolin* v. *Steward*, 14 C. B. 595; cited and considered post, Book III.

(*z*) *King* v. *Norman*, 4 C. B. 884; *Marzetti* v. *Williams*, 1 B. & Ad. 415, 424, (cited *Boorman* v. *Brown*, 3 Q. B. 526; *S C.*, 11 Cl. & F. 1; and *Bell* v. *Carey*, 8 C. B. 893.)

Where a vendor covenants that he has good right to convey, immediately on the execution of the conveyance, if he has not such right, his covenant is broken, and an action may instantly be commenced by the covenantee, without waiting for a disturbance of his possession; for an eviction does not constitute the breach of the covenant in question, but is consequential damage arising therefrom: Platt on Covenants, p. 311; Per Sir *J. Mansfield*, C. J., *King* v. *Jones*, 5 Taunt. 426.

As regards the plaintiff's right to nominal damages, at all events, for breach of contract, see, further, *Richardson* v. *Barnes*, 4 Exch. 128; ante, p. 87.

ment, good in law, stipulates for the payment on a day named of a specific and ascertained sum by one of the parties to it, the primâ facie measure of damages will be the precise sum thus stipulated to be paid (*a*). Where, in other words, an action is brought for the recovery of a *fixed* pecuniary demand, founded upon contract, and the plaintiffs' claim is established, unreduced by any set-off or by proof of a partial failure of consideration, the true measure of damages, as determined by the act of the parties, will be that sum which the defendant has undertaken or contracted to pay. Thus, in *Lethbridge* v. *Mytton* (*b*), the defendant, by settlement made upon his marriage, conveyed estates upon certain trusts, and covenanted with the trustees to pay off incumbrances upon the estates so conveyed to the amount of 19,000*l.* within a year. It was held, that, upon the defendant's default in paying off these incumbrances, the trustees were entitled to recover against him the whole 19,000*l.* in an action of covenant, although no special damage was laid or proved. In this case, however, execution was ordered not to issue until a future day named by the Court; and Lord *Tenterden* intimated, that the defendant might in the interim, if he thought fit, make application to a Court of equity, where the matter could be better and more satisfactorily arranged than at law.

In any case similar to the preceding, and generally in an action of covenant or asssumpsit for the non-payment of a liquidated sum, the measure of damages will clearly be the sum agreed to be paid by the defendant to the plain-

(*a*) To the class of cases here indicated, the remark of Lord *Mansfield* in *Robinson* v. *Bland*, 2 Burr. 1077, 1086, applies,—that, where an action is brought for the breach of a contract for the *payment of money only*, the suit, although nominally for damages, does, from the very nature of the case, become a suit for specific performance.

(*b*) 2 B. & Ad. 772; *Loosemore* v. *Radford*, 9 M. & W. 657.

tiff. If the precise sum due and payable to the plaintiff is not ascertained by the contract, it will be for the jury to say how much has been proved to be due to the plaintiff at the time of bringing the action (*c*). And, in either of these cases, interest will or will not be recoverable according to the nature of the demand, and the manner in which it arose (*d*). Inasmuch as the action of debt lies only for a sum *certain*, or *capable of being reduced to a certainty*, and the damages recoverable in that form of action for detention of the debt are merely nominal (*e*), it follows that the entire amount to be awarded to the plaintiff will, due regard being of course had to the evidence adduced, be purely matter of calculation, either by the jury or before a master, under s. 94 of the Com. L. Pr. Act, 1852 (*ee*), or, as usually happens where perplexed and intricate accounts have to be unravelled, before an arbitrator chosen by the parties. Sometimes, moreover, the law itself defines the mode of computing the amount recoverable in an action, as, for instance where the plaintiff sues his co-contractors for contribution (*f*), or where the claim is for general average (*g*).

Hence, it has been said (*h*), that, "in contract, the measure of damages is *generally* matter of account, and the

(*c*) See *Walker* v. *Broadhurst*, 8 Exch. 889.

(*d*) 1 Arch. Pr., 8th ed., p. 443; Tidd New Pr. p. 521.

The cases in which interest is recoverable will be specified at the end of this Chapter.

(*e*) *Nosotti* v. *Page*, 10 C. B. 643; *Lowe* v. *Steele*, 15 M. & W. 380; *Gell* v. *Burgess*, 7 C. B. 16.

But now, "In all actions where the plaintiff recovers a sum of money, the amount to which he is entitled may be awarded to him by the judgment generally, without any distinction being therein made as to whether such sum is recovered by way of a debt or damages:" 15 & 16 Vict. c. 76, s. 95.

As to the damages in detinue, see *Williams* v. *Archer*, 5 C. B. 318.

(*ee*) See also 17 & 18 Vict. c. 125, ss. 1, 3.

(*f*) *Batard* v. *Hawes*, 2 E. & B. 287; *Boulter* v. *Peplow*, 9 C. B. 493, 508; ante, p. 317.

(*g*) See *Hallett* v. *Wigram*, 9 C. B. 580; *Atkinson* v. *Stephens*, 7 Exch. 567.

(*h*) Per *De Grey*, C. J., *Sharpe* v. *Brice*, 2 W. Bla. 942; cited arg. *Williams* v. *Currie*, 1 C. B. 845.

damages given may be demonstrated to be right or wrong;" the rule most frequently applicable being, that 'the amount which would have been received if the contract had been kept is the measure of damages if it be broken.' To take a simple instance of this:—A. being indebted to B. in the sum of 500*l.* for goods sold, gave B. a bill for 600*l.* drawn by himself (A.) to get discounted, upon these terms: that B. should retain to his own use the sum of 100*l.* and the discount, and should pay over the balance to A. Here the measure of damages in an action by A.'s assignees against B. was held to be the amount of the bill *minus* the 100*l.* and discount (*i*).

The last-mentioned rule flows directly from the fundamental principle on which damages are awarded by our law, viz. that compensation may thus be made to the party who complains of breach of contract; sufficient examples of the practical working of this elementary doctrine will almost immediately present themselves.

Penalty—liquidated damages

Again,—in written contracts, whether special or simple, giving rise respectively to actions of covenant and of assumpsit, it not unfrequently happens that the parties themselves assume to define the precise amount of liability which shall be incurred for breach of contract (*k*). If so, and if it appears that the amount thus specified is really intended as *liquidated* (or ascertained) *damages*, the jury will be relieved from any inquiry touching the amount of compensation to be awarded to the plaintiff; but will, under the direction of the Judge, find the precise sum agreed upon and stipulated to be paid by the parties.

(*i*) *Alder* v. *Keighley*, 15 M. & W. 117.

(*k*) As to the damages recoverable in debt—on bond, see 1 Wms. Saund. 6th ed., 58, 58 b; ante, pp. 282--3 —on a replevin bond, see *Stansfeld* v. *Hellawell*, 7 Exch. 373.

Where, however, parties agree that a specific sum shall be payable by way of *penalty* for breach of contract, our Courts will apply equitable principles in the assessment of damages; not, indeed, allowing them to exceed the sum thus stipulated, but requiring evidence to be given for the purpose of fixing their precise amount, and enabling the jury to award it accordingly.

The distinction, sometimes difficult to appreciate, which exists between a *penalty* and *liquidated damages*, may be illustrated by the case of *Kemble* v. *Farren* (*l*). That was an action of assumpsit for the breach of an engagement by the defendant to perform as an actor at the plaintiff's theatre during several consecutive seasons. This agreement contained various clauses and stipulations between the parties, inter alia, that the defendant should perform, that the plaintiff should pay him so much on every night that the theatre should be open for theatrical performances during the time in question, and that, if either of the parties should neglect or refuse to fulfil the said agreement or any part thereof, or any stipulation therein contained, such party should pay to the other the sum of 1000*l.*, which sum was declared to be *liquidated and ascertained damages*, and *not a penalty* or in the nature thereof. Notwithstanding, however, this expression of the intention of the parties, the Court of Common Pleas held, that the amount specified was to be regarded as a *penalty* merely, and not as liquidated damages; for they observed that, if an agreement contains clauses, some sounding in uncertain damages and others relating to certain pecuniary payments,

(*l*) 6 Bing. 141 (following *Astley* v. *Weldon*, 2 B. & P. 346); *Horner* v. *Flintoff*, 9 M. & W. 678; Per *Bayley*, J., *Davies* v. *Penton*, 6 B. & C. 223; *Edwards* v. *Williams*, 5 Taunt. 247; *Beckham* v. *Drake*, 2 Ho. L. Cas. 579, 598, 614.

as happened in the case sub judice, and the action is brought for the breach of a clause of an uncertain nature, it would be absurd to construe the sum specified in the agreement as liquidated damages; because, if so, a very large sum *might* become immediately payable in consequence of the non-payment of a very small one, such case being precisely that in which Courts of Equity have always relieved, and against which Courts of Law have, in modern times, endeavoured to relieve, by directing juries to assess the real damages sustained by the breach of contract.

The principle above laid down must, however, be very cautiously applied, and can be safely relied on only where the terms of the agreement in question are similar in kind to those which came before the Court in *Kemble* v. *Farren;* for, where the defendant had contracted not to practise as a perfumer within a certain district, and for the observance of this contract bound himself to the plaintiff in the sum of 5000*l.* "as and by way of liquidated damages and not of penalty," the case last cited was held inapplicable (*m*), on the ground, that, although where a deed contains several stipulations of various degrees of importance, as to some of which the damages might be considered liquidated, whilst for others they might be deemed unliquidated, and a sum of money is made payable upon a breach of any of them, the Courts have held it to be a penalty only, and not liquidated damages, yet, where the damage is *altogether* uncertain, and a definite sum of money is, nevertheless, expressly made payable in respect of it by

(*m*) *Price* v. *Green*, 16 M. & W. 346; *S. C.* 13 Id. 695; *Rawlinson* v. *Clarke*, 14 M. & W. 187; *S. C.* 15 Id. 292; *Atkyns* v. *Kinnier*, 4 Exch. 776; *Hurst* v. *Hurst*, Id. 571; *Galsworthy* v. *Strutt*, 1 Exch. 659; *Leighton* v. *Wales*, 3 M. & W. 545. And see *Beckham* v. *Drake*, ante, note (*l*).

way of liquidated damages, those words must be read in their ordinary sense, and cannot be construed to import a penalty (*n*).

Where the contracting parties have not by mutual stipulations precisely indicated the amount of damages to be recoverable by either in the event of a breach of contract, such damages will have to be assessed according to the general rules of law:—"that, where a person makes a contract and breaks it, he must pay the whole damage sustained" (*o*);—"that, where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed" (*p*).

The rules just stated admit of simple illustration. Thus, A., having recovered a judgment for 281*l.* 3*s.* 6*d.* against B., agreed with C. to forbear to sue out execution upon the judgment until a future day, in consideration whereof C. undertook that he would on or before that day erect a substantial dwelling-house, and cause a lease of the same to be granted to A., such lease when granted to be in satisfaction of the judgment. In an action by A. against C. for breach of this undertaking, the measure of damages was held to be the value of that (viz. the lease of the house in question) which the defendant had promised to give, in consideration of the plaintiff's forbearance (*q*).

The following classes of cases concerning contracts for

(*n*) Per *Alderson*, B., 13 M. & W. 701--2; and in *Atkyns* v. *Kinnier*, 4 Exch. 784; Per *Parke*, B., Id. 783.

(*o*) Per *Alderson*, B., *Robinson* v. *Harman*, 1 Exch. 855--6.

(*p*) Per *Parke*, B., Id. 855.

(*q*) *Strutt* v. *Farlar*, 16 M & W. 249; and see *Alder* v. *Keighley*, cited ante, p. 634; *Hill* v. *Smith*, 12 M. & W. 618; *Cort* v. *The Ambergate, Nottingham, and Boston R. C.*, 17 Q. B. 127; *Petre* v. *Duncombe*, 20 L J., Q. B, 242.

the sale of goods, for the sale or demise of real property, contracts of hiring and service, &c., may also properly be noticed in connection with the rules for the measure of damages last stated.

Contracts for sale of goods.

Contracts for the sale of chattels or personal property may be broken either by the vendor's neglect to deliver the goods contracted for; or by the vendee refusing to accept them, or to pay their stipulated price; or by the article delivered proving different from what it was represented to be at the time of sale. To some extent, indeed, it may perhaps be said, such agreements furnish their own measure of damages, inasmuch as Courts of justice, without desiring to fix any arbitrary rate of compensation, will mainly endeavour to carry into effect, so far as they can by awarding pecuniary damages, the contract of the parties; and to this rule the sole exception seems to be, that, in the case of an unconscionable and oppressive bargain, the jury is sometimes allowed to disregard the precise terms of the agreement actually concluded, and to give fair and equitable damages (*r*).

If, however, there be no element of fraud, no attempt at overreaching in the case, the very terms of the given contract will, under circumstances such as are above supposed, in general suggest the proper measure of damages to be applied on its breach. Thus, in an action at suit of the vendee for non-delivery of goods, stock, or shares (purchased but not paid for) pursuant to contract, the general rule is, that the measure of damages is the difference between the contract price and the market price of the subject-

(*r*) *James* v. *Morgan*, 1 Lev. 111; *Thornborrow* v. *Whitacre*, 2 Ld.Raym. 1164; Sedgwick Dams., 2nd ed., p. 212; Bac. Abr. "Damages" (D.); Sayer on Damages, p. 46, where it is said, that, "if, in an action of assumpsit, the plaintiff has declared upon a *catching contract*, damages may be assessed to the amount of a lesser sum than would have been due in case the contract had not been a catching one."

matter of the contract at the time of the breach (*s*); so that, if the price of the goods, stock, or shares contracted for has not varied, the purchaser will be entitled to nominal damages only (*t*) for their non-delivery.

Further, where the purchaser of goods resells them before the time fixed for their delivery, he will be restricted by the above specified measure of damages, viz. the difference between the contract price and the market price at the date of the breach of contract; and he will not be entitled to recover the amount of the claim, if any, enforceable by his sub-vendee for breach of contract against himself; because, immediately on receiving notice of the defendant's breach of contract, the plaintiff ought to have supplied himself with the article in question, in order to be able to deliver it to his buyer (*u*).

In an action at suit of the vendor of merchandise against the vendee for not accepting it, the measure of damages will similarly be determined by reference to the contract price and the market price at the time of refusing to accept the goods. A. contracted for the purchase of wheat, "to be delivered at Birmingham as soon as vessels could be obtained for the carriage thereof;" subsequently, the market having fallen, A. gave notice to the seller that he would not accept the wheat, then being on its transit to Birmingham, if it were delivered. In an action against A. for not accepting the wheat, the proper measure of damages

(*s*) *Gainsford* v. *Carroll*, 2 B. & C. 624, cited arg. 14 C. B. 336; *Shaw* v. *Holland*, 15 M. & W. 136; *Tempest* v. *Kilner*, 3 C. B. 249, 253; *Leigh* v. *Paterson*, 8 Taunt. 540; *Startup* v. *Cortazzi*, 2 Cr. M. & R. 165; *Boorman* v. *Nash*, 9 B. & C. 145; *Stewart* v. *Cauty*, 8 M. & W. 160; *Logan* v. *Le Mesurier*, 6 Moo. P. C. C. 116.

(*t*) *Valpy* v. *Oakeley*, 16 Q. B. 941, 950; and see *Startup* v. *Cortazzi*, supra.

(*u*) *Peterson* v. *Ayre*, 13 C. B. 353, 365. See *Waters* v. *Towers*, 8 Exch. 401, cited post, p. 651.

was held to be the difference between the contract price and the market price on the day when the wheat was tendered to A. for acceptance at Birmingham, and was refused (*x*).

The rules above laid down may be considered as applicable, under ordinary circumstances, for determining the measure of damages in an action for the non-delivery or non-acceptance of goods bargained and sold. It would seem, however, that proof of special facts on behalf of the plaintiff might vary the rule to be applied for the assessment of his damages. "If," says *Erle*, J., on a recent occasion (*y*), "goods are not delivered or accepted according to contract, time and trouble as well as expense *may* be required either in getting other similar goods or finding another purchaser, and the damages ought to indemnify both for such time, trouble, and expense, and for the difference between the market price and the price contracted for" (*z*). "Most cases of contract," says Lord *Cottenham*, C. (*a*), "vary from each other, and whatever general rules there may be as to awarding damages, they must be modified by the particular cases to which they come to be applied."

Loan of stock, shares, &c.

Again,—in an action for breach of a contract to replace stock lent, the measure of damages is held to be the price of the stock on the day when it ought to have been replaced, or its price on the day of the trial, at the plaintiff's option (*b*). "The true measure of damages" in all these

(*x*) *Phillpotts* v. *Evans*, 5 M. & W. 475.

(*y*) *Beckham* v. *Drake*, 2 H. L. Cas. 607–8.

(*z*) See, also, *Dunlop* v. *Higgins*, 1 H. L. Cas. 381, (where, in moving judgment in a case to be decided with reference to the Scotch law, Lord *Cottenham*, C., seems to have recognised the above rule as applicable in this country). *Waters* v. *Towers*, cited post, p. 651.

(*a*) 1 H. L. Cas. 403.

(*b*) *Shepherd* v. *Johnson*, 2 East, 210; *M'Arthur* v. *Lord Seaforth*, 2 Taunt. 257; *Downes* v. *Back*, 1 Stark. N. P. C. 318; *Harrison* v. *Harrison*, 1 C. & P. 412.

cases is that which will completely indemnify the plaintiff for the breach of the engagement. If the defendant neglect to replace the stock at the day appointed, and the stock afterwards rise in value, the plaintiff can only be indemnified by giving him the price of it at the time of the trial. And it is no answer, to say that the defendant may be prejudiced by the plaintiff's delaying to bring his action; for it is his own fault that he does not perform his engagement at the time; or he may replace it at any time afterwards, so as to avail himself of a rising market" (c). So, in an action for not re-delivering mining shares, lent to the defendant upon a contract to return them on a given day, the true measure of damages will, if they have not been replaced, be the market price of the shares at the time of the trial (d).

In *Hochster* v. *De La Tour* (e), it was held that a party to an executory agreement may, before the time for executing it has arrived, break the agreement, either by disabling himself from fulfilling it or by renouncing the contract, and that an action will lie for such breach before the time for the fulfilment of the agreement. "The man who wrongfully renounces a contract into which he has deliberately entered, cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party and cannot be prejudicial to the wrong doer." And, "in either case, the jury, in assessing the damages, would be justified in

(c) Per *Grose*, J., 2 East, 212. (d) *Owen* v. *Routh*, 14 C. B. 327
(e) 2 E. & B. 678.

looking to all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of trial" (*f*). In an action ex contractu, however, the damages cannot be reduced by proof of a breach of contract on the plaintiff's part subsequently to the commencement of the action (*g*).

Action for price of goods

No difficulty in regard to the measure of damages can occur where the price of goods sold is sued for. The amount to be recovered will in this case depend simply upon the evidence adduced.

Breach of warranty, &c

Formerly, where an action was brought for the agreed price of a specific chattel sold *with a warranty*, or of work which was to be performed *according to contract*, the practice was to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross action for breach of the warranty or contract; in which action as well the difference between the price contracted for and the real value of the articles or of the work done, as any consequential damage, might have been recovered. It may be well to observe, however, that the practice in regard to this point is now different. In either of the foregoing cases and in that of goods agreed to be supplied according to contract, it is held competent for the defendant to shew how much less the subject-matter of the action is worth by reason of the breach of contract, and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of the contract declared upon, so as to be precluded from recovering in another action to that extent; but no

(*f*) As to the measure of damages for the breach of an executory contract, see *Masterton* v. *Mayor &c of Brooklyn*, 7 Hill (U. S.) R. 61, recognised in *Story* v. *New York and Harlem R. C.* 2 Selden (U. S.) R. 85.

(*g*) Per *Jervis*, C. J., *Bartlett* v. *Holmes*, 13 C. B. 638. And see per *Maule*, J., *Lewis* v. *Clifton*, 14 Q. B. 255.

more (*h*). To the rule just stated, which thus, in certain cases, obviates the necessity of bringing a cross action for breach of contract, there are, however, some exceptions (*i*).

Without attempting here to inquire as to the effect of payment, or of a plea of set-off, on the amount of damages to be awarded, in regard to which subjects reference must be made to works of a more technical character than the present, I may add, that, even where the statute of set-off does not apply, it is competent to a defendant, with a view to avoiding the "scandal and absurdity" (*j*) of a circuity of action, to set up a cross demand by way of defence to an action upon contract, provided he can shew by his plea that the sum which he claims to be entitled to recover back is of necessity the identical sum for which the plaintiff is suing (*k*). It is obvious, however, that a defence such as here alluded to, would go to the whole cause of action, and not merely in reduction of damages.

On referring to the cases latterly cited, it may perhaps be thought, as suggested at p. 638, that the very terms of the particular contract under consideration do, to some extent, indicate the true measure of damages applicable on its breach; it cannot be denied, however, that sometimes the rule by which to adjust the damages is ill-defined, and sometimes much latitude, even in actions strictly founded upon contract, is allowed to the jury in assessing them.

(*h*) Judgm. *Mondel* v. *Steel*, 8 M. & W. 870--2; *Rigge* v. *Burbidge*, 15 M. & W. 598; *Parsons* v. *Sexton*, 4 C. B. 899; *Dawson* v. *Collis*, 10 C. B. 523; *Allen* v. *Cameron*, 1 Cr. & M. 832. *Street* v. *Blay*, 2 B. & Ad. 456, is a leading authority upon the above point. See also *Newton* v. *Forster*, 12 M. & W. 772.

(*i*) As to which see the judgment *Mondel* v. *Steel*, 8 M. & W. 871.

(*j*) Per Lord *Denman*, C. J., *Walmsley* v. *Cooper*, 11 Ad. & E. 216.

(*k*) *Charles* v. *Altin*, 15 C. B. 46, 62. See also, as to the subject above mentioned, *Connop* v. *Levy*, 11 Q. B. 769; *Wilders* v. *Stevens*, 15 M. & W. 208; *Smith* v. *Marsack*, 6 C. B. 486; *Bartlett* v. *Holmes*, cited ante, p. 642, n. (*g*).

What, for instance, it may be asked, in the case of the breach of a covenant to repair, is the true measure of damages? Is it, in accordance with the opinion of Lord *Holt*, the amount which would be required to put the premises into repair (*l*)? Is it the amount of injury done to the reversion by the premises being out of repair (*m*)? Or, to speak more specifically, is it the loss which the landlord would sustain if he sold his reversion in the market (*n*)? The latter of these methods of determining the damages would seem to be the most satisfactory and most true.

Contract of hiring and service—wrongful dismissal

Let us next inquire what, in an action for breach of an agreement of hiring and service by a wrongful dismissal of the plaintiff from his employment, would be the proper measure of damages? It would be obtained by considering what is the usual rate of wages for the employment contracted for, and what time would be lost before a similar employment could be obtained. The law considers that employment in any ordinary branch of industry can be obtained by a person competent for the place, that the usual rate of wages for such employment can be proved, and further, that, when a promise for continuing employment is broken by the master, it is the duty of the servant to use diligence to find another employment (*o*). If, indeed, the

(*l*) *Vivian* v. *Champion*, 2 Ld. Raym. 1125.

(*m*) *Doe* d. *Worcester Trustees* v. *Rowlands*, 9 Car. & P. 734.

(*n*) Per *Martin*, B., *Smith* v. *Peat*, 9 Exch. 161, 166. See *Logan* v. *Hall*, 4 C. B. 598.

It is usual, in an action of covenant brought within the term for not repairing, to give only nominal damages, inasmuch as the lessee may afterwards repair during the term; but this is merely a rule of discretion: Platt on Covenants, p. 289.

As to the mode of computing the damages in an action for freight, see per *Maule*, J., *Cockburn* v. *Alexander*, 6 C. B. 814–5.

(*o*) Per *Erle*, J., *Beckham* v. *Drake*, 2 H. L. Cas. 606, and in *Goodman* v. *Pocock*, 15 Q. B. 584; Per *Crompton*, J., *Emmens* v. *Elderton*, 13 C. B. 508.

particular employment could not be again obtained without delay, and if the wages stipulated for in the contract broken were higher than usual, the damages should be such as to indemnify for the loss of wages during that delay, and for the loss of the excess of the wages contracted for above the usual rate; but no allowance would be made in the nature of *pretium affectionis*, nor for any pain caused to the plaintiff by his dismissal in consequence of his being attached to the place of his employment (*p*).

In the case of a wrongful dismissal, then, we may conclude that the servant or party dismissed may recover such damages as the jury think the loss of the situation has occasioned. If the plaintiff has obtained, or is likely to obtain, another situation, the damages ought, on that ground, to be proportionately less, or even nominal, regard being had to the real loss sustained (*q*). Considerable latitude seems, however, in cases of the kind before us, to be permitted to the jury (*r*).

Of the general rule laid down at p. 637, and heretofore partially illustrated—that "where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed,"—some qualifications, of much practical importance, demand our notice.

Contracts for sale of land.

In the first place, contracts for the sale of real estate are held to be made subject to the condition, that the vendor has a good title; so that, when a person contracts to sell real property, there is an implied understanding, that, if (without

(*p*) Per *Erle*, J., 2 H. L. Cas. 607.

(*q*) Per *Crompton*, J., 13 C. B. 508. As to the proper mode of declaring for a wrongful dismissal, see *Emmens* v. *Elderton*, 13 C. B. 509, 532; *Goodman* v. *Pocock*, 15 Q. B. 576; *Fewings* v. *Tisdal*, 1 Exch. 295; with which cases compare the note to *Cutter* v. *Powell*, 2 Smith L. C. p. 1; *Lilley* v. *Elwin*, 11 Q. B. 742, 755.

(*r*) *Smith* v. *Thompson*, 8 C. B. 44.

fraud on his part) he fails to make out a good title, the only damages recoverable will be the expenses which the vendee may be put to in investigating the title(*s*). Nominal damages only, says Sir *E. Sugden*(*t*), are, in the case here supposed, recoverable by the vendee for the loss of his bargain.

Since, moreover, every one who purchases land, knows or is presumed to know, that difficulties may exist as to the making of a title, which were not anticipated at the time of entering into the contract, should the purchaser think proper to enter into possession and to incur expense in alterations before the title is ascertained, he will do so at his own risk(*u*).

In *Hopkins* v. *Grazebrook*(*v*), a person who had contracted for the purchase of an estate, but had not himself obtained a conveyance of it, sold it by auction, with a stipulation to make a good title by a day named. This he was unable to do, inasmuch as his vendor refused to convey, and it was held, that the purchaser by auction might, beyond his expenses, recover damages for the loss which he had sustained by not having the contract carried into effect. This case is distinguishable from *Flureau* v. *Thornhill*, below cited(*s*), where the defendant was actually owner of the estate which he sold, and offered such a title to it as he had; whereas, in *Hopkins* v. *Grazebrook*, the defendant imprudently sold an estate of which he was not owner, and to which he had not the power of conferring even the shadow of a title. It seemed, therefore, but fair that he should be compellable to make good any loss which the purchaser

(*s*) Per *Parke*, B., *Robinson* v. *Harman*, 1 Exch. 855; *Flureau* v. *Thornhill*, 2 W. Bla. 1078; *Walker* v. *Moore*, 10 B. & C. 416; *Hanslip* v. *Padwick*, 5 Exch. 615.

(*t*) V. & P., 11th ed., vol. 1, p. 422. See *Hodges* v. *Earl of Lichfield*, 1 B. N. C. 492.

(*u*) Judgm. *Worthington* v. *Warrington*, 8 C. B. 134.

(*v*) 6 B. & C. 31; *Robinson* v. *Harman*, 1 Exch. 850.

had sustained by reason of not having that for which he had contracted (*x*).

Where a party has been let into possession of land under a contract of purchase which he then refuses to complete, and no conveyance is executed, the vendor cannot recover from him the whole amount of the purchase money, but only the damages actually sustained by his breach of contract (*y*). The measure of damages in an action of this nature is the injury sustained by the plaintiff by reason of the defendant not having performed his contract. The question is, how much worse off is the plaintiff, owing to the diminution in the value of the land or to the loss of the purchase money, in consequence of the non-performance of the contract? "It is clear he cannot have the land and its value too. A party cannot recover the full value of a chattel, unless under circumstances which import that the property has passed to the defendant, as in the case of goods sold and delivered, where they have been absolutely parted with and cannot be sold again" (*y*).

Damage—when too remote.

The next point which may present difficulty in applying the general rule (*z*) for measuring the damages is, in determining whether or not the damage laid in the declaration is sufficiently connected with the alleged injury to justify its recovery by action. As introductory to this part of the subject, the following remarks of Dr. Story in his Treatise on Agency (*a*) may advantageously be noticed—indicating a kind of damage which would certainly be *too remote.* "If," says that learned writer, "an agent who is bound to render an account and to pay over monies to his principal at a particular time, should omit so to do, whereby the prin-

(*x*) See Sugd. V. & P., 11th ed., vol. 1, p. 425; *Gosbell* v. *Archer*, 2 Ad. & E. 500.

(*y*) Per *Parke*, B., *Laird* v. *Pim*, 7 M. & W. 474, 478.

(*z*) Ante, pp. 637, 645.

(*a*) 4th ed., p. 280.

cipal should be unable to pay his debts or to fulfil his other contracts, and should stop payment and fail in business, or be injured in his general credit thereby, the agent would not be liable for such injury; for it is but a remote or accidental consequence of the negligence. So, if an agent, having funds in his hands, should improperly neglect to ship goods by a particular ship according to the orders of his principal, and the ship should duly arrive, and, if the goods had been on board, the principal might, by future reshipments and speculations, have made great profits thereon, the agent will not be bound to pay for the loss of such possible profits, for it is a mere contingent damage, or an accidental mischief." And, "the same reasoning would apply to a case where, by the neglect of an agent to remit money, the principal has been prevented from engaging in a profitable speculation in some other business by his want of the funds" (*b*).

In connection with the foregoing observations, the case of *Stanton* v. *Collier* (*c*) will be found worthy of perusal. There the plaintiff (who was a printer) declared for the breach of a contract to re-deliver a printing machine held by the defendant as security for money due to him, and which was to be re-delivered to the plaintiff upon certain terms.—The damage alleged was, that, by reason of the non-delivery of this machine, the plaintiff had lost great gains and profits, which would have resulted to him from its use, that his entire business and trade had been ruined, and that he had thereby become insolvent. Now, although no decision was given by the Court upon the question, whether the damage thus alleged was too remotely connected with the wrong done to be recoverable, it would certainly *seem*, referring to what Dr. Story says, in part to have been

(*b*) Story on Agency, 4th ed., p. 281. (*c*) 3 E. & B. 274.

so. On proof of the circumstances here alleged, the plaintiff, it is conceived, would have been entitled to recover for the loss of profits, but not for damage resulting from his insolvency.

The subject of remoteness of damage in an action of contract was much considered by the Court of Exchequer in a recent case (*d*), where the following rule in regard to it is laid down—that "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." Where (as the Court in the case just cited proceed to remark) a contract is made with reference to *special circumstances*, and such special circnmstances are communicated by the plaintiff to the defendant, and are thus known to both the contracting parties, the damages which might reasonably be contemplated as likely to result from a breach of such contract, would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known and communicated. But, on the other hand, if the special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have

(*d*) *Hadley* v. *Baxendale*, 9 Exch. 341.

specially provided for the event of a breach of contract occurring, by special terms as to the damages to be paid in such case, and of this advantage it would be very unjust to deprive them.

In *Hadley* v. *Baxendale*, the rule above laid down and explained was applied. That was an action of assumpsit for the breach of a contract, whereby the defendants (who were carriers) had undertaken to convey for the plaintiffs (who were millers and occupiers of a steam mill) a broken shaft, used for working the mill, which was forwarded to the consignee, to serve as a pattern by which a new shaft might be constructed. The breach alleged was, that, by the negligence of the defendants, the broken shaft was not delivered in reasonable time to the consignee, in consequence whereof the completing of the new shaft was delayed, and the plaintiffs were prevented from working their steam mill and supplying their customers with flour, and were deprived of the gains and profits which they might have made by so doing. It was proved, at the trial of this case, that the plaintiffs' servant, on delivering the shaft to the defendants' clerk, had stated that 'the mill was stopped, and that the shaft must be sent immediately;' but it did not appear that any further details, shewing the exigency of the case, had been communicated on the one side, or that any promise to use special diligence had been given on the other. The Court of Exchequer held, that the damage here claimed by the plaintiffs was too remote to be recoverable, the loss of profits complained of not being such a consequence of the alleged breach of contract as could have been *fairly and reasonably contemplated* by both the parties when they made it. How, for instance, could the defendants know that the plaintiffs had not an-

other shaft in their possession, or that their wish was not merely to send back the broken shaft to the engineers who made it? The special circumstances of the case never were communicated to the defendants, a knowledge of which alone could have enabled them to have foreseen or contemplated the damage which ensued.

With *Hadley* v. *Baxendale* should be compared two previously adjudged cases—*Black* v. *Baxendale* (*e*) and *Waters* v. *Towers* (*f*).

In the former of these cases, the plaintiff had sent certain goods by the defendants, who were carriers, to a country town, intending that they should arrive in time for the market there on a certain day, of which intention, however, *the defendants had no notice.*—In consequence of the non-delivery of the goods by the defendants within reasonable time, expenses were incurred in removing them for sale to another place, and the jury included the amount of such expenses in their verdict. The Court of Exchequer seem to have thought that the jury were wrong in so doing, but, as the amount of their verdict was under 20*l.*, refused, in accordance with the recognised rule in such cases, to grant a new trial. "If," said *Pollock*, C. B., "the carriers had had distinct notice that the goods would be required to be delivered at a particular time, perhaps they would have been liable for those expenses for which without such notice they would not be liable; but, whether any particular class of expenses is reasonable or not, depends upon the usage of trade and various other circumstances."

The decision in *Waters* v. *Towers* (*f*) shews, that, in an action for the breach of a contract to deliver goods, consequential loss through the plaintiff's inability to perform a

(*e*) 1 Exch. 410. (*f*) 8 Exch. 401.

sub-contract entered into by him *may* sometimes be recoverable as special damage.

A review, however, of decided cases, seems to shew that the rule has not been uniformly observed, or very clearly settled (*h*), as to the right of a party to claim a loss of profits as a part of the damages for breach of a special contract. Perhaps the best practical test which can be suggested for application is this, that, if the profits are such as would have accrued and grown out of the contract itself, as the *direct and immediate results* of its fulfilment, then they would form a just and proper item of damages to be recovered against the delinquent party upon a breach of the agreement. The realisation of such profits as are here indicated may, indeed, be considered as forming part and parcel of the contract itself, and must have been in the contemplation of the parties when the agreement was entered into; but if they are such as would have been realised by the party from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract, then they are too uncertain and remote to be taken into consideration as a part of the damages occasioned by the breach of the contract in suit (*i*).

(*h*) Compare the remarks of *Alderson*, B., 8 Exch. 403, with the cases, infra.

(*i*) *Fox* v. *Harding*, 7 Cushing (U. S.) R. 522-3.

As to recovering loss of profits see also *Hanslip* v. *Padwick*, 5 Exch. 615.

It has been held, that, in an action for breach of warranty of a horse, the loss of a bargain for resale of the horse is not recoverable as special damage: *Clare* v. *Maynard*, 6 Ad. & E. 519. Nor, in such an action, can the costs of improvidently defending an action, brought against the plaintiff by his sub-vendee for breach of warranty, be recovered: *Wrightup* v. *Chamberlain*, 7 Scott, 598, (with which compare *Mainwaring* v. *Brandon*, 8 Taunt. 202). "No person," says Lord *Denman*, C. J., in *Short* v. *Kalloway*, 11 Ad. & E. 31, "has a right to inflame his own account against another by incurring additional expense in the unrighteous resistance to an action which he cannot defend."

See also *Walker* v. *Hatton*, 10 M.

Further, the rule laid down in *Hadley* v. *Baxendale* was applied in *Theobald* v. *The Railway Passengers' Assurance Company* (*j*), where the action, in form ex contractu, was brought to recover compensation from the defendants in respect of an injury sustained by the plaintiff, one of their insured, whilst travelling by railway. The true measure of damages in this case was held to be compensation for the personal injury resulting from the accident, not exceeding, however, the sum which the company would have been liable to pay in the case of death, and irrespective of any loss of time or profits consequential on such injury; for "what the insurance company calculate on indemnifying the party against is the expense and pain and loss *immediately connected with* the accident, and not remote consequences that may follow, according to the business or profession of the passenger."

General rule as to remoteness of damage stated.

Upon the whole we may conclude, that, under ordinary circumstances, loss recoverable for breach of contract must be such as would naturally, i. e. in a great majority of similar cases, flow from the breach alleged;—that, if there were special circumstances in the case, which would have made the loss complained of a reasonable and natural consequence of the breach, it must be shewn that such special circumstances were communicated to or known by the defendants (*k*).

Interest; when recoverable.

Interest is in certain cases recoverable as damages by *statute*, in other cases *at common law*. The stat. 3 & 4

& W. 249; *Malden* v. *Fyson*, 11 Q. B. 292; *Richardson* v. *Chasen*, 10 Id. 756; *Pierce* v. *Williams*, 23 L. J., Exch., 322; *Smith* v. *Howell*, 6 Exch. 730.

(*j*) 10 Exch. 45.

(*k*) Judg., *Hadley* v. *Baxendale*, 9 Exch. 356. In the argument in this case, many decisions are collected in regard to remoteness of damage.

As to the measure of damages in actions of contract see, further, the Law Mag. for May, 1855.

Will. 4, c. 42, s. 28, enacts, "That, upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue or on any inquisition of damages, *may, if they shall think fit*, allow interest to the creditor, at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time; or, if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment (*l*): provided that interest shall be payable in all cases in which it is now payable by law" (*m*). Sect. 29 further empowers the jury, on the trial of any issue or on any inquisition of damages, if they shall think fit, to give damages, in the nature of interest, over and above the money recoverable, in all actions on policies of assurance made after the passing of the Act.

The former of these sections, it will be remarked, is permissive merely—not imperative—as regards the allowance of interest. Cases not within its operation are to be still regulated by the common law—under which interest is recoverable only in the following cases (*n*):—

1. By the usage of trade, ex. gr. on bills of exchange (*o*) or promissory notes, or on an agreement to pay for goods

(*l*) See *Mowatt* v. *Lord Londesborough*, 3 E. & B. 307, 336; *S. C.* (in error), 4 Id. 1.

(*m*) See *Harper* v. *Williams*, 4 Q. B. 219, 234; *Attwood* v. *Taylor*, 1 M. & Gr. 279, 332; *Edwards* v. *The Great Western R. Co.*, 11 C. B. 588, 650.

(*n*) See per Lord *Ellenborough*, C. J., *Havilland* v. *Bowerbank*, 1 Camp. 50; *Page* v. *Newman*, 9 B. & C. 378, 381; Per Lord *Mansfield*, C. J., *Eddowes* v. *Hopkins*, 1 Dougl. 376; *Calton* v. *Bragg*, 15 East, 223, 226.

(*o*) See Byles on Bills, 6th ed., Chap. 22; *Gibbs* v. *Fremont*, 9 Exch. 25; *Hutton* v. *Ward*, 15 Q. B. 26.

&c. by bill or note (*p*), or on a guarantie for the due payment of a bill (*q*). On a bond (*r*) also, and on a mortgage, interest is recoverable (*s*).

2. Where there has been an express contract to pay interest (*t*). "If," says *Tindal*, C. J. (*u*), "it be the intention of the party to obtain interest, it is always in his power to insert in the contract an express stipulation to that effect."

3. Where, from the course of dealing between parties, a contract to pay interest may be implied (*x*).

In taking leave of the subject of Contracts, some brief concluding observations may not be deemed superfluous. The importance of a knowledge of the higher classes of contracts, and of the qualities which attach to judgments of our Courts of Record or to instruments under seal, will, I apprehend, readily be conceded.—And the necessity of having an acquaintance with the characteristics of simple contracts (to a consideration of which the foregoing pages have principally been devoted) will be at least equally obvious, when

(*p*) *Davis* v. *Smyth*, 8 M. & W. 399; *Farr* v. *Ward*, 3 Id. 25; *Marshall* v. *Poole*, 13 East, 98, 101; *Middleton* v. *Gill*, 4 Taunt. 298; *Porter* v. *Palsgrave*, 2 Camp. 472; *Becher* v. *Jones*, Id. 428, n.; *Boyce* v. *Warburton*, Id. 480.

(*q*) *Ackermann* v. *Ehrensperger*, 16 M. & W. 99.

(*r*) *Farquhar* v. *Morris*, 7 T. R. 124. See *Hogan* v. *Page*, 1 B. & P. 337.

(*s*) *Price* v. *The Great Western R. C.*, 16 M. & W. 244; *Morgan* v. *Jones*, 8 Exch. 620; Wms. Saunds., 6th ed., vol. 1, p. 201, n.(*r*).

(*t*) *Attwood* v. *Taylor*, 1 M. & Gr. 279; *Orme* v. *Galloway*, 9 Exch. 544; *Francis* v. *Wilson*, Ry. & Moo. 105; *Doman* v. *Dibden*, Id. 381.

(*u*) *Foster* v. *Weston*, 6 Bing. 714.

(*x*) *Nichol* v. *Thompson*, 1 Camp. 52, n., and cases there cited: *Petre* v. *Duncombe*, 20 L. J., Q. B., 242; *Denton* v. *Rodie*, 3 Camp. 496; *Gwynn* v. *Godby*, 4 Taunt. 346.

As to levying interest under writs of execution, see Reg. Prac., H. T., 1853, reg. 76, 77.

As to interest on writs of error, see 3 & 4 Will. 4, c. 42, s. 30; Reg. Pl. Trin. T., 1853, reg. 26. See *Levy* v. *Langridge*, 4 M. & W. 337.

As to allowing compound interest, see *Fergusson* v. *Fyffe*, 8 Cl. & F. 121.

we reflect that mercantile engagements, almost without exception, belong to this, the lowest class of contracts—that transactions such as these, ranging from the simplest to the most elaborate and important, depend often upon nothing more than the hastily written and peculiarly worded correspondence of trading firms, separated by either of the great oceans from each other: bearing this in mind, we shall per force admit, that not merely to the professed lawyer, but to the layman, some considerable familiarity with the elements—with the principles—of our law merchant is essential. In the ordinary affairs of life, also, in the constantly recurring cycle of daily or familiar events, as well the most momentous as the most trivial compacts known to law are authenticated neither by seal nor by record. The purchase of necessaries in a shop, and the solemn contract of marriage, which is founded on the consent of the contracting parties—evidenced per verba de præsenti,—seem to be, in strictness, alike referable to the class of simple contracts (*y*).

In proportion, however, to its importance, is the difficulty of acquiring the knowledge here alluded to. Not only are causes of action ex contractu almost infinitely varied, but the matters of defence pleadable in such actions are equally diversified;—whilst statutory provisions, relative to the one and to the other, are extremely numerous. Hence the learning applicable to contracts can but be acquired gradually—by experience—and practice. In connection with the lowest, as with the best authenticated contract—with that which is oral as with that which is founded on record or on Act of Parliament, (which latter has been designated

(*y*) "Our law," says Blackstone (1 Com. p. 433), "considers marriage in no other light than as a civil contract.'

as the highest kind of specialty (z)),—points of perplexity and doubt will suggest themselves to the inquirer. The great principles, however, which support this entire subject, are, at all events, surely traced and ascertained, and the better they are understood, illustrated by a comparison of decided cases, tested and examined, the more will they be found consistent with common sense—with sound policy—with the dictates of wisdom and of justice.

(z) *The Cork and Bandon R. C.* v. *Goode*, 13 C. B. 826, 836; 1 Wms. Saund. 38, 38 a.

BOOK III.

OF TORTS.

CHAPTER I.

OF TORTS GENERALLY—THEIR NATURE AND CLASSIFICATION.

A TORT is described in statutory language (*a*) as 'a wrong, independent of contract.' It involves the idea, if not of some infraction of law, at all events of some infringement or withholding of a legal right—or some violation of a legal duty (*b*).

An action of *tort* will lie for a direct injury to the person or property, for the wrongful taking or conversion of goods, for consequential damage: the right of action for a tort being founded 1. on the invasion of some legal right (*c*), or 2. on the violation of some duty towards the public productive of damage to the plaintiff (*d*), or 3. on the infraction of some private duty or obligation productive likewise of damage to the complainant (*e*).

The importance of having a correct perception of the na-

(*a*) See the Com L. Proc. Act, 1852.

(*b*) Co. Litt. 158. b.; 3 Bla. Com. 118; ante, p. 75.

The word 'duty' above used signifies 'that which a person owes to another or to the public generally—that which a person is bound by any legal obligation to do or perform;' see Webster Dict. ad verb

Although the above definition would include within the term 'duty,' the obligation to pay a debt or to perform an agreement, it is not usual to employ this term in reference to obligations purely ex contractu.

(*c*) Post, pp. 659, 660.

(*d*) Post, p. 661.

(*e*) Post, p. 676.

ture of a right of action founded upon tort or wrong independent of contract, will justify a brief examination of each of the three classes of cases above specified.

Rights of action ex delicto.

Class I. Action for invasion of a right.

First, then, as to the class of cases in which complaint is made of the invasion of some legal right—(that is, of some legal right actually in the possession of the complainant, and to the enjoyment whereof he is exclusively entitled,)—ex. gr. where wrong is done to the person or reputation—where goods are tortiously converted, or a direct injury is done to property. Here, a plaintiff, in order to entitle himself to damages, *may* be called upon to shew two things—the existence of the right alleged, and its violation.

Now, the existence of the right alleged will have to be established by reference to legal principles. It sometimes admits of easy proof, as in the case of an action of trespass for taking away goods, where the plaintiff would have a primâ facie case sufficient to entitle him to recover, upon merely proving his own possession of the goods, and that they were tortiously taken out of it by the defendant; the reason of this being, that bare possession gives a right as against a wrong doer, for the invasion whereof an action of trespass will lie (*f*).

So, we have already (*g*) seen that trespass will lie for a mere entry upon land in possession of another, although, if an action be brought by a reversioner for injury done to his reversionary interest in land demised, a foundation for the claim to damages would have to be laid by shewing that the injury complained of was of so durable a kind as necessarily to be productive of damage to his estate (*h*).

(*f*) Per *Ashhurst*, J., *Smith* v. *Milles*, 1 T R. 475, 480; post, Chap. 3, sect. 2. See also *The Imperial Gas Light &c. Co.* v *The London Gas Light Co.*, 10 Exch. 39.

(*g*) Ante, p. 89; Judgm. *Ryan* v *Clark*, 14 Q. B. 71.

(*h*) *Kidgill* v. *Moor*, 9 C. B. 364; *Dobson* v. *Blackmore*, 9 Q. B. 991; *Jackson* v. *Peshed*, 1 M. & S. 234; post, Chap. 3, sect. 1.

But, further, the existence of a right may have to be proved by an appeal to elementary principles and by deductions ingeniously drawn from them, by a discussion of general doctrines of public policy, or by embarrassing inquiries touching the intention of the Legislature. In support of this remark, I would refer to the great case of *Ashby* v. *White*, formerly abstracted (*h*)—to the equally important judgment in *Semayne's case* (*i*), illustrating the fundamental maxim of our law, that 'every man's house is his castle' (*k*),—to the opinions of the Judges, and the decision of the House of Lords, in *Jefferys* v. *Boosey* (*l*), where the long vexed question as to the existence of copyright at common law was re-agitated, and an opinion in the negative regarding it was expressed (*m*)—to all those numerous cases (some of which will have to be hereafter noticed) wherein the existence of a right has been found to depend upon the interpretation of the statute law, and the unravelling of its perplexities (*n*).

In the class of cases now under consideration, it will noticed, that proof of actual damage has not been specifi as requisite to entitle a complainant to recover. Many ior stances confirmatory of this remark—that an action may lie for the invasion of a right without proof of special damage—were cited in a former chapter (*o*); where, inter alia, reference was made to various decisions which establish that the fraudulent use and appropriation of a trade mark is, per se, actionable. To what was then said upon this part of the

(*h*) Ante, p. 85.

(*i*) 1 Smith L. C. 39.

(*k*) Leg. Max., 2nd ed., p. 321.

(*l*) 4 H. L. Cas. 815.

(*m*) See particularly per Lord *Brougham*, Id. 964; Per Lord *St. Leonards*, Id. 77.

(*n*) See, for instance, *Ellwell* v. *The Proprietors of the Birmingham Canal Navigation*, 3 H. L. Cas. 812.

(*o*) Ante, Book I. Chap. 3, pp. 84 et seq.; *Nicklin* v. *Williams*, 10 Exch. 259, 267.

subject, I would add, that, in close analogy to the principle just stated, it has been decided in the United States, that a coach proprietor running carriages between a railway station and a town has no right falsely to hold himself out as being in the employment or under the patronage of a particular hotel keeper in such town, by affixing to his carriages, &c., the name of the hotel, this being done to the detriment of some other party lawfully entitled to the privilege in question (*p*). And, in the case just cited, it was further held, that the representation thus falsely made for the purpose of enticing passengers from the plaintiff's carriages, would be a fraud on him, and a violation of his rights, for which an action would lie *without proof of actual or specific damage* (*q*).

Rights of action ex delicto.

Class II. Action for breach of public duty —producing damage.

Secondly. An action ex delicto may be founded on the violation of some public duty, (i. e. of some duty towards the public), and consequent damage to the complainant. Now, here three different matters must be proved in order to entitle the plaintiff to a verdict, viz. the existence of the alleged duty—its breach—and damage: the first of which items, viz. the existence of the public duty, must be shewn, either by bringing the facts of the case within the reach and control of some acknowledged doctrine of the common law, or by shewing that they are within the words, spirit, or purview of an Act of Parliament.

Let us, under the term "public duty," include the duty of refraining from doing, as well as that of doing, acts of a particular kind or tendency, and we may then lay down the proposition above stated, thus, in a somewhat expanded form—Wherever a duty has to be observed towards the public by an individual, and another is specially injured in

(*p*) *Marsh* v. *Billings*, 7 Cush. (U. S.) R. 322.

(*q*) 7 Cush. (U. S.) R. 332; and see *Newhall* v. *Ireson*, 8 Id. 595.

consequence of the non-observance or non-discharge of such duty, or through misfeasance or malfeasance in its discharge, an action will lie at suit of the latter party against the former (*r*).

Public duty —at common law.

As simple illustrations of the practical working of this proposition, I may at once refer to the cases below cited, which establish, that—wherever an instrument, dangerous in its existing state, and calculated to inflict damage on those who may come in contact with it, is so placed as to be likely to cause injury, the person thus placing it is liable, if injury ensues, to the party injured (*s*).

Let us pause here for a moment to notice one characteristic of the class of cases now under review. The breach of a public duty causing damage to an individual, in truth, combines two tortious ingredients, which are, according to circumstances, more or less clearly distinguishable from each other—the wrong done to the public, and the wrong done to the individual. That which is, in strictness, correlative to a public duty is a right enforceable at suit of the public. But, then, the general rule of law is well settled, that individuals cannot enforce a public right, or redress a public injury by suits in their own names (*t*). Where they suffer wrong or sustain damage *in common with other members of the community*, no personal right of action thence accrues. The private grievance is merged in that of the public, and the remedy (if any exists) will be by public prosecution, in order that the rights of the public may thus be vindicated. Even where one person sustains an injury in common with the public, and, from the circumstances in which he happens to be placed, suffers more fre-

(*r*) See 3 Bla. Com. 165.

(*s*) *Scott* v. *Shepherd*, 1 Smith L. C. 210, cited ante, p. 95; *Gilbertson* v. *Richardson*, 5 C. B. 502; *Bird* v. *Holbrook*, 4 Bing. 628, (with which compare *Ilott* v. *Wilkes*, 3 B. & Ald. 304; *Jordin* v. *Crump*, 8 M. & W. 782; *Deane* v. *Clayton*, 7 Taunt. 489); Judgm. 6 Exch. 767—8.

(*t*) Ante, pp. 96—100.

quently or more severely than others, he will not, on that account, have, as of course, a separate right of action. It is only where he suffers some special damage, differing in kind from that which is common to others, that a personal remedy accrues to him (*u*).

Bearing in mind what has been just said, I would repeat, that in every case belonging to the class now under consideration will be found as an ingredient some nonfeasance, misfeasance, or malfeasance of a public duty—constituting pro tanto an offence (not necessarily indictable) against the public—also an injury productive of special damage to an individual.

Thus, in *Ellis* v. *The Sheffield Gas Consumers Company* (*v*), the action was brought against a registered joint-stock company, who had contracted with an individual for the laying down of their gas pipes in the town of Sheffield, without having obtained any special powers for that purpose. It appeared, that, in the course of making the necessary excavations, a heap of stones had been left in one of the streets, over which the plaintiff, whilst passing in the dark, fell—thus sustaining an injury. The declaration charged, that the defendants had committed a nuisance in obstructing, without due powers, the public thoroughfare; and the plaintiff having obtained a verdict, it was contended, that the action should have been brought against the contractor whose workmen had caused the injury, and not against the company; but, Lord *Campbell*, C. J., observed, this "is simply the case of persons employing another to do an unlawful act, and a damage to the plaintiff from the doing of such unlawful act. We have the *injuria et damnum* (*x*),

(*u*) See *Brainard* v. *Connecticut River R. C.*, 7 Cush. (U. S.) R. 510, 511.

(*v*) 23 L. J., Q. B., 42; *S. C.* 2 E. & B. 767. See *Overton* v. *Freeman*, 11 C. B. 867; *Gayford* v. *Nicholls*, 9 Exch. 702.

(*x*) Ante, pp. 75, 93, 106.

which constitute a ground of action." Again—in *Barnes* v. *Ward* (*y*), the question was—whether or not there is any duty cast upon the owner of a house and premises adjoining a public footway to fence them off in such a manner as to prevent damage to any one lawfully passing along the public way, who might, otherwise, by diverging accidentally from his track, owing to the state in which the premises chanced to be, meet with an accident? The Court held that such a duty or obligation is, under the circumstances named, cast upon the owner of property; and that its non-observance will render him liable for injury caused thereby. In each of the foregoing cases we find, as elements, a breach of a public duty and a private wrong producing damage.

As throwing light upon the subject before us, the case of *Brown* v. *Mallett* (*z*), and the elaborate judgment there delivered by Mr. Justice *Maule*, demand careful examination. The question raised in that case was as follows:—What is the duty of the person who had the possession and control of a vessel, which, without any fault of his, has, whilst in his possession, sunk, so as to obstruct a public navigable river, with respect to vessels navigating the river after his possession and control has ceased? "There seems no doubt," observed the Court, "that it is the duty of a person using a public navigable river, with a vessel of which he is possessed and has the control and management, to use reasonable skill and care to prevent mischief to other vessels; and that, in case of a collision arising from his negligence, he must sustain, without compensation, the damage occasioned to his own vessel, and is liable to pay compen-

(*y*) 9 C. B. 392; Judgm. 8 M. & W. 788.

(*z*) 5 C. B. 599; *The King* v. *Watts*, 2 Esp. 675; *Parnaby* v. *Lancaster Canal Co.*, 11 Ad. & E. 238; *Hancock* v. *York, Newcastle, and Berwick R. C.*, 10 C. B. 348; *White* v. *Crisp*, 10 Exch. 312. See also *Card* v. *Case*, 5 C. B. 622.

sation for that sustained by another navigated with due skill and care. And this liability is the same whether his vessel be in motion or stationary, floating or aground, under water or above it; in all these circumstances the vessel may continue to be in his possession, and under his management and control; and, supposing it to be so, and a collision with another vessel to occur from the improper manner in which one of the two is managed, the owner of the vessel properly managed is entitled to recover damages from the owner of that which was improperly managed. This duty of using reasonable skill and care for the safety of other vessels is incident to the possession and control of the vessel. Subject to this obligation, the owner has a right, while his vessel is afloat, to proceed in any direction and to remain at any place; and when it is aground, whether sunk or not, to remain as long as the occasions of his voyage require. Of the existence of these rights and of these duties, so long as the possession and control of the vessel continue in the same person, there seems to be no doubt. Nor does there seem to be any doubt, that, if these were transferred to another person, the rights and the duties would also be transferred to him, and the original owner would cease to be entitled to or bound by them." A person, however, may cease to have the possession and control of a vessel, although they are not transferred to any other person, ex. gr. by some casualty of navigation (as in the case sub judice)—what *then* are the rights and obligations of the owner? Assuming that the loss of the vessel arose from unavoidable accident—that the owner is wholly blameless in regard to it, and that there are no special circumstances casting upon him a continuing liability, it seems clear that he is not compellable to remove the obstruction to the navigation caused by the sunken

vessel, nor even to take measures for diminishing the danger arising from it. Inasmuch, then, as an indictment would not lie, under the circumstances stated, for the danger and impediment to the public, no action would be maintainable for particular damage resulting from the obstruction in question to an individual. The duty of the defendant (if it existed at all) would be of a public nature; and the plaintiff, in order to succeed, would have to shew *a breach of public duty as well as special injury to himself* (*a*).

Where, then, an action is brought for damage caused by breach of a public duty, the damage, and not the breach of duty, is that for which the complainant sues—his object being,—not to vindicate a right on behalf of the public (*b*), but—to recover compensation for a wrong done to himself. Between the public and the private wrong, concurring in a cause of action of the kind now alluded to, the distinction should always carefully be traced out. The mode of tracing it may be fully illustrated by *Couling* v. *Coxe* (*c*), where the action was in case against a witness for not obeying a subpœna; and the Court observed, "that, in such an action, brought for a breach of duty—not arising out of a contract between the plaintiff and the defendant (*d*), but—for disobeying the order of a competent authority,—the existence of actual damage or loss is essential to the action, —as the law will not imply a loss to the plaintiff from mere disobedience to the subpœna." In other words, the law will here discriminate between the breach of the public duty and the personal injury, which form the component elements of the complete right of action.

(*a*) Judgm. 5 C. B. 620.
(*b*) Ante, p. 662.
(*c*) 6 C. B. 703.
(*d*) As to cases such as are here alluded to, see post, p. 677.

That our law does so discriminate in the case just put may, indeed, incontrovertibly be shewn. It is clearly established, that, in an action brought for disobeying a subpœna, the declaration must contain an averment that the plaintiff had "a good cause of action" in the original suit, because, if he had not such cause, no damage could have been sustained by him through the witness's default (*e*). If, however, proceedings by attachment be taken against the defaulting party, such proceedings being founded upon the contempt and wilful disobedience manifested to the process of the Court, no such averment need be made.

Now, the distinction just pointed out is thus explicable,—with reference to the question, whether or not an action under the circumstances supposed is maintainable, the Court has to direct its attention as well to the private injury as to the contempt or public offence; whereas, on motion for an attachment, it has to consider the latter only. "To found a motion for an attachment against a witness for disobeying a subpœna, it must be shewn that he has wilfully abstained from attending in pursuance thereof, or that he has in some way treated the process of the Court with contempt"(*f*). Should the party subpœnaed succeed in purging himself of the alleged contempt, he will still be liable to an action "for any injury which the plaintiff may have sustained in consequence of his non-attendance" at Nisi Prius; and in support of such action there will yet remain, as an ingredient, a wrong towards the public in disobeying the process of the Court (*f*). Not only in the case above put

(*e*) Judgm. 6 C. B. 718-9; *Mullett* v. *Hunt*, 1 Cr. & M. 752; *Needham* v. *Fraser*, 1 C. B. 815. See *Wade* v. *Simeon*, 2 C. B. 548, 566.

(*f*) *Marshall* v. *The York, Newcastle and Berwick R. C.*, 11 C. B. 398, 403, 404.

does the right of action admit of satisfactory analysis, but in other cases falling within the class now under notice, a similar process may generally, without difficulty, be pursued.

In the examples latterly presented, the right of action has been founded on the breach of a public duty, existing at common law, productive of damage to the plaintiff. A public duty may also be imposed, in part or wholly, by the statute law; when this is so, the precise nature and extent of the statutory duty must of course be determined by reference to the words of the Act creating it, as stated at p. 661, and as illustrated by some recent cases below cited (*g*).

Statutory public duty.

Lord *Holt* indeed lays down (*h*), that "wherever a statute enacts anything, or prohibits anything for the advantage of any person, that person shall have remedy to recover the advantage given him, or to have satisfaction for the injury done him, contrary to law, by the same statute; for it would be a fine thing to make a law by which one has a right, but no remedy but in equity" (*i*)—which seems equivalent to saying, that, "when a statute gives a right, then, although in express terms it has not given a remedy, the remedy which by law is properly applicable to that right follows as an incident" (*k*).

The remark of Lord *Holt*, above cited, may assist in re-

(*g*) *Hilcoat* v. *Archbishop of Canterbury*, 10 C. B. 327; *Robinson* v. *Gell*, 12 C. B. 191; *The General Steam Nav. Co.* v. *Morrison*, 14 C. B. 581; *Morrison* v. *The General Steam Nav. Co.*, 8 Exch. 733; *The General Steam Nav. Co.* v. *Mann*, 14 C. B. 127.

(*h*) *Anon.*, 6 Mod. 27.

(*i*) "Whenever an Act gives a right, it means to give a legal remedy, and not to put the party to the extraordinary remedy of a Court of equity:" *Mitchell* v. *Knott*, 1 Sim. 499.

(*k*) Per *Maule*, B., *Braithwaite* v. *Skinner*, 5 M. & W. 327. See, also, under the maxim ubi jus ibi remedium, Leg. Max., 2nd edit., p. 146; post, pp. 675-6.

moving any preliminary difficulty which might be felt in regard to certain enactments which impose a duty, but do not specify a remedy or penalty for its breach. The recent decision of the Court of Queen's Bench in *Couch* v. *Steel* (*l*) is important, as shewing that the mere imposition of a penalty for the breach of a statutory duty will not necessarily deprive an individual injured thereby of an action ex delicto for damages. The question there arose with reference to the statute 7 & 8 Vict. c. 112, s. 18, which enacts "that every ship navigating between the United Kingdom and any place out of the same, shall have and keep constantly on board a sufficient supply of medicines and medicaments, suitable to accidents and diseases arising on sea voyages" according to a certain scale issued by the Admiralty. For default in fulfilment of the duty thus created a penalty is, by the section just cited, imposed. The plaintiff, however, sued for special damage to himself thence resulting, and the action so brought was held to be maintainable, by force of the following reasons: the duty created by the above Act, being one of a public nature, the defaulter would, at common law, be subject to an indictment for a breach of it; the remedy by indictment, however, is impliedly taken away by the provision in the Act imposing a penalty; there was, nevertheless, beyond the public wrong, a special and particular damage sustained by the plaintiff, by reason of the breach of duty by the defendant, for which he could have no remedy, unless an action on the case at his suit were maintainable. "If, indeed," says Lord *Campbell*, C. J., "the performance of a new duty, created by Act of Parliament, is enforced by a penalty *recoverable by the*

(*l*) 3 E. & B. 402. In connection with the first count of the declaration in this case, see *Gibson* v. *Small*, 4 H. L. Cas. 370, 404.

party grieved by the non-performance, there is no other remedy than that given by the Act, either for the public or the private wrong; but, by the penalty given in the Act now in question, (7 & 8 Vict. c. 112), compensation for private special damage seems not to have been contemplated. The penalty is recoverable in case of a breach of the public duty, though no damage may actually have been sustained by anybody; and no authority has been cited to us, nor are we aware of any, in which it has been held, that, in such a case as the present, the common law right to maintain an action in respect of a special damage, resulting from the breach of a public duty, (whether such duty exists at common law or is created by statute), is taken away by reason of a penalty recoverable by a common informer being annexed as a punishment for the non-performance of the public duty" (*m*), such latter process being applicable, even where no actual damage is sustained by any one.

The judgment in *Couch* v. *Steel*, read in connection with the facts there appearing, might of itself almost suffice to illustrate the nature of a statutory public duty; torts, however, being in kind exceedingly diversified, and some familiarity with their leading characteristics being essential, it may be proper to offer some further explanatory remarks upon this subject.

To commence, then, with the case of *Fawcett* v. *The York and North Midland R. C.* (*n*)—that was an action on the case against the company just named, the declaration in which charged, that, under certain Acts of Parliament,

(*m*) Judgm., 3 E. & B. 413 (distinguishing *Stevens* v. *Jeacocke*, 11 Q. B. 731).

See *The Kennet and Avon Canal Navigation* v. *Witherington*, 21 L. J., Q. B., 419; *Boyce* v. *Higgins*, 14 C. B. 1.

(*n*) 16 Q. B. 610.

the defendants were required to keep closed the gates leading from an adjoining highway on to their railway, so as to prevent cattle or horses passing along the road from entering thereupon, save and except at such times as the gates were necessarily open for the purpose of allowing carriages and cattle, &c., to cross the line. The breach alleged was, that the defendants, "disregarding their duty and the statutes in that behalf, did not maintain good and sufficient gates across each end of the said highway at the point where the same was crossed by the railway," and did not keep the gates across the said highway at that point shut and closed, but omitted to do so during long spaces of time, and when the gates were not required to be open for other purposes; such being the gravamen of the charge, the damage alleged was, that certain horses belonging to the plaintiff, and at the time of the happening of the alleged wrongful act *lawfully* being on the highway in question, strayed from thence on to the railway, and were there run down and killed by a train of carriages.

Now, it appeared in evidence that the plaintiff's horses had escaped from an adjacent field belonging to him on to the highway, and an issue was accordingly raised on the record, as to whether or not the horses could be said to have been "lawfully" upon the highway in question, before passing through the gate belonging to and under the control of the company. The Court of Queen's Bench, however, in the first place, thought, that, as against the defendants, the horses were lawfully on the highway, and, this point being disposed of, further held, that the railway company were bound and required to keep the gate in question shut at all times, except those specified in their Act; and that, having been guilty of a breach of their duty in this

behalf, and having thus occasioned damage to the plaintiff, they were legally compellable to make it good. In this case accordingly, the gist of the action was the wrongful breach of a statutory public duty cast on the defendants, coupled with consequential damage to the complainant.

With the preceding case should be compared *Ricketts* v. *The East and West India Docks, &c., R. C.* (o). That was an action for damage done to sheep of the plaintiff, which, straying from his land on to the defendants' railway, were there killed. The declaration alleged that it was the duty of the defendants to make and erect a sufficient fence in and upon land taken for the use of the railway &c., so as to prevent cattle from escaping out of the *adjoining lands* on to the railway; and the breach averred was the non-observance of this duty. Such being the nature of the charge made, the defendants pleaded, inter alia, as follows:—that, at the time of the occurrence complained of, another railway company, (to wit, the Great Northern), were possessed of the lands adjoining to and abutting on the defendants' line—and that the sheep of the plaintiff, being *wrongfully and unlawfully* upon such lands, had thence escaped and strayed upon the railway, the plaintiff *not being the owner or occupier* of those lands. To this plea—the plaintiff demurred; and it was therefore open to him to avail himself as well of any statutory liability imposed on the defendants, as of any negligence or misfeasance on their part at common law. Accordingly, in the first instance, reliance was placed, in his behalf, upon

(o) 12 C. B. 160; Acc., *The Manchester, Sheffield, and Lincolnshire R. C.* v. *Wallis*, 14 C. B. 213 (citing *Bird* v. *Holbrook*, ante, p. 662, (s); and *Barnes* v. *Ward*, ante, p. 664); *Sharrod* v. *The London and N. W. R. C.*, 4 Exch. 580.

the stat. 8 & 9 Vict. c. 20, s. 68, by which railway companies are bound to make and maintain sufficient fences "for separating the land taken for the use of the railway from the adjoining lands not taken," and "for preventing the cattle of the *owners or occupiers* thereof from straying thereout," &c. This section of the Act, however, was held not to apply under the circumstances, inasmuch as the plaintiff was not the owner or occupier of the adjoining land. The plaintiff was consequently obliged to fall back upon his rights at common law, and to contend, amongst other things, that the defendants, carrying on a dangerous trade, were bound to exercise it with more than ordinary caution, so as not to do damage to the public.—To this argument, it was answered, however, that negligence was not alleged, and that at common law the company were only bound to keep their fences in repair, as against the proprietors of the adjoining lands, and not as against the plaintiff, whose sheep were wrongfully thereupon.

Again—under the stat. 1 & 2 Vict. c. 98, the public duty was imposed upon a railway company of conveying (and therefore of conveying *safely*) officers of the post-office, in charge of the mails and letter bags transmitted along their line; through negligence in the performance of this duty injury was caused to the plaintiff, an officer so being conveyed; the company causing it were held to be liable to him for their misfeasance (*p*).

Lastly, upon this part of the subject may be cited the case of *Coe* v. *Platt* (*q*), as forcibly exemplifying the importance of looking narrowly at the language of a statute im-

(*p*) *Collett* v. *The London and N. W. R. C.*, 16 Q. B., 984. In connexion with which case, see *The Great Northern R. C.* v. *Harrison*, 10 Exch. 376; *Lygo* v. *Newbold*, Exch. 302.

(*q*) 6 Exch. 752; *S. C.* (in error), 7 Id. 460.

posing a public duty before suing for its breach.—There the decision of the Court principally turned on the meaning of the 21st sect. of the Factory Act (7 & 8 Vict. c. 15), which requires, amongst other things, that "all parts of the mill-gearing in a factory shall be securely fenced," and that "the said protection to each part shall not be removed while the parts required to be fenced are in motion by the action of the steam-engine, water-wheel or other mechanical power, *for any manufacturing process.*" The declaration in the case before us stated that the defendants were the occupiers of a building in which steam power was used to work machinery employed in manufacturing cotton, and in part of which building there was certain mill-gearing being a shaft which was worked and put in motion by the said steam power, yet the defendants disregarded their duty in this, that the shaft was not securely fenced, contrary to the form of the statute, whereby the plaintiff received great bodily injury, &c. On demurrer, the above declaration was held bad, because it did not shew that at the time of the accident the shaft which occasioned it was in motion for a "manufacturing process." The defect thus exposed in the declaration having been amended by inserting in it an allegation, that a certain part of the mill-gearing by which the accident was occasioned was in motion at the time for a manufacturing process, the plaintiff was again defeated upon the following facts: the injury complained of was received from a vertical shaft in motion, but at a time when by its motion it turned no machinery immediately connected with it, either in the room where the plaintiff was, or in any other room, the shaft in question being itself turned by a horizontal shaft communicating with the motive power. Looking at the evidence adduced the Court held, that the shaft, which caused the injury, could not, when it happened, be said to have been in motion

for "any manufacturing process," and did not therefore require at that time to be fenced under the provisions of the Factory Act (*r*).

We may now, I think, conclude that a statutory duty towards the public may consist either in doing, or in abstaining from doing some particular act—that "if the law casts any duty upon a person, which he refuses or fails to perform, he is answerable in damages to those whom his refusal or failure injures" (*s*),—that the non-performance of a legal obligation of this kind will not be actionable without special damage (*t*),—and further, that "where any law requires one to do any act for the benefit of another, or to forbear the doing of that which may be to the injury of another, though no action be given in express terms by the law for the omission or commission, the general rule of law in all such cases is that the party so injured shall have an action" (*u*): this last proposition being however subject to an important qualification, viz. "that an action will not lie for the infringement of a right created by statute, where another specific remedy for infringement is provided by the same statute" (*x*), or, as remarked in *Doe* d. *Bishop of Rochester* v. *Bridges* (*y*), "where an Act creates an obligation

(*r*) *Coe* v. *Platt*, 7 Exch. 923.

(*s*) Per Lord *Brougham*, *Ferguson* v. *Earl of Kinnoull*, 9 Cl. & F. 289.

(*t*) As to this proposition, see the reasoning, ante, p. 662. See, also, in support of it, *Owen* v. *Legh*, 3 B. & Ald. 470; distinguished in *Cort* v. *The Ambergate &c. R. C.*, 1 E. & B. 120, where *Coleridge*, J., observes,—

If a man sells a book in my library *without meddling with it*, he does me no harm; but if he takes it away and sells it in market overt, I lose my book," and shall consequently be entitled to redress as against the wrong-doer.

(*u*) Per Lord *Holt*, C. J., *Ashby* v. *White* (ed. 1887), p. 11.

(*x*) Judgm., *Stevens* v. *Jeacocke*, 11 Q. B. 741 (citing *Underhill* v. *Ellicombe*, M'Cl. & Y. 450); *Watkins* v. *The Great Northern R. C.*, 16 Q. B. 961. See *Chapman* v. *Pickersgill*, 2 Wils. 146-7; ante, p. 669.

(*y*) 1 B. & Ad. 847, 859.

Further, it seems to be true, that,

and enforces the performance in a specified manner," it holds generally true "that performance cannot be enforced in any other manner" (z).

Right of action ex delicto

CLASS III. Action for breach of private duty —producing damage.

Thirdly, a right of action ex delicto may be founded on the infraction of some private compact, or of some private duty or obligation, and consequential damage to the complainant.

Any duty, moreover, must in strictness be deemed 'private,' which is to be observed, not towards the community at large, but in relation to one or more of its members. The class of private duties is consequently extremely large, it comprehends duties flowing from contract express or implied, from bailment, from the relation of master and servant, or of landlord and tenant,—from the occupancy of land, &c.; as throwing some light upon the nature of such duties, the authorities *infra* may be consulted (a).

Now, in any case referable to this class the plaintiff must, in order to sustain his action, be able to prove some kind of contract or obligation out of which the specific duty, with a breach whereof the defendant is charged, will flow in legal contemplation, or he must adduce evidence of facts establishing such a relation between the defendant and himself, that such specific duty will thence result. Further than this, he must, of course, shew a breach of the duty thus raised, and consequential damage to himself.

"Where authority is given by the Legislature to do an act, parties injured by the doing of it have no legal remedy, but should appeal to the Legislature" *Pilgrim* v. *The Southampton and Dorchester R. C.*, 7 C. B. 226.

(z) Ante, p 669.

(a) *Wood* v. *Cuming*, 15 M. & W. 626; *S. C.*, 16 Id. 628; *Keates* v. *Earl of Cadogan*, 10 C. B. 591; *Gott* v. *Gandy*, 2 E. & B. 845; *Alston* v *Grant*, 3 E. & B. 128; *S. C.*, 23 L. J., Q. B., 163; *Seymour* v. *Maddox*, 16 Q. B. 326; *Brown* v. *Boorman*, 11 Cl. & F. 1.

A private, as well as a public (*b*), duty, may exist by virtue of the statute or of the common law. Thus, it has been held that case will lie against a railway company for acts of wrongful omission of their statutory duty in regard to the transfer of shares, and for wrongfully declaring the same forfeited and selling them (*c*). "The declaration," said Lord *Campbell*, C. J., "shews both *injuria* and *damnum*. The defendants have been guilty of a wrongful act of omission in not registering the plaintiff's name in their books, and also of a wrongful act of commission in declaring the shares to be forfeited, and in confirming that forfeiture. It is said that the plaintiff could sustain no injury; but he has been deprived of the ordinary privileges of shareholders, and contingently of any profits that might have arisen upon the shares. Those are clearly injuries, for which he has a right to bring an action."

Statutory private duty

Again—a private duty may exist at common law (*d*), for breach whereof, coupled with consequential damage, an action will be sustainable.—Upon this part of the subject I shall here offer only a few general remarks, which will be applied seriatim to several large and important classes of cases.

Private duty at common law

In the first place it will be convenient to observe, that although tort differs essentially from contract as the foundation of an action, it not unfrequently happens that a particular transaction admits of being regarded from two different points of view, so that when contemplated from one of these it presents all the characteristics of a good cause

Tort flowing from breach of contract.

(*b*) Ante, p. 661.

(*c*) *Catchpole* v. *The Ambergate, &c. R. C.*, 1 E. & B. 111.

(*d*) Duties, such as are now alluded to, oftentimes arise by virtue of established maxims of our common law; for instance, the maxim sic utere tuo ut alienum non lædas, in connection with the rights of vicinage. See Leg. Max. 2nd ed. p. 274.

of action ex contractu; and, when regarded from the other, it offers to the pleader's eye sufficient materials whereupon to found an action ex delicto. Thus carriers warrant the transportation and delivery of goods intrusted to them; attornies, surgeons, and engineers undertake to discharge their duty with a reasonable amount of skill, and with integrity, and for any neglect or unskilfulness by individuals belonging to one of these professions, a party who has been injured thereby may maintain an action either in tort for the wrong done or in contract at his election (*e*). In short, to use the words of Lord *Campbell*, C. J., in *Brown* v. *Boorman* (*f*), wherever there is a contract, and something to be done in the course of the employment which is the subject of that contract,—if there is a breach of a duty in the course of that employment, the plaintiff may recover either in tort or in contract: that is to say, "where there is an employment, which employment itself creates a duty, an action on the case will lie for a breach of that duty, although it may consist in doing something contrary to an agreement made in the course of such employment by the party upon whom the duty is cast (*g*)." "Generally speaking," indeed, says *Maule*, J. (*h*), "the law has endeavoured to assimilate actions of tort arising out of contract with actions on contracts:" "so that the breach of a contract may be a wrong, in respect of which the party injured may sue in case, instead of suing upon the contract" (*i*).

Now, where the tort complained of thus flows from a contract express or implied, there is manifestly direct

(*e*) See *Bartholomew* v. *Bushnell*, 20 Day (U. S.) R., 279, 280; *Pozzi* v. *Shipton*, 8 Ad. & E. 963.

(*f*) 11 Cl. & F. 44.

(*g*) Per *Jervis*, C. J., *Courtenay* v *Earle*, 10 C. B. 83.

(*h*) *Howard* v. *Shepherd*, 9 C.B. 319.

(*i*) Per *Cresswell*, J., 9 C. B. 321.

An action on the case, however, would not lie for a *mere* breach of contract. Judgment, *Woods* v. *Finnis*, 7 Exch. 372.

privity between the parties. It must not, however, thence be inferred that privity is in general necessary to support an action ex delicto: many of the cases above cited shew that it is not so. As establishing the fundamental distinction here adverted to between actions of contract and of tort, the following cases may be instanced:—A. (a stage coach proprietor) contracts with B. to carry his servant (C.), and in so doing is guilty of negligence, which causes injury to C., and consequent damage, by reason of loss of service, to his master.—Under these circumstances, A. may be sued in an action ex contractu by B., and in an action ex delicto by C.,—privity not being needed to support such latter action, which is founded upon the principle,—that, where a coach proprietor undertakes to convey a passenger, and does so negligently, he is answerable for the consequences (*j*). In like manner, if a mason contracts to erect a bridge or other work on a public road, and erects it not in accordance with his contract, and so as to be a nuisance to the highway, a third person, who sustains injury by reason of its defective construction, may recover damages from the contractor, who will not be allowed to protect himself from liability by shewing an absence of privity between himself and the injured party, or by shewing that he (the defendant) is also responsible to another for breach of contract (*k*). So, if an apothecary administer improper medicines to his patient, or a surgeon unskilfully treat him and thereby injure his health, the apothecary or surgeon will be liable to the patient, even where the father or friend of the patient may have been the contractee; for, though no such contract had been made, the apothecary, if he gave impro-

Privity—whether necessary in an action ex delicto.

(*j*) *Marshall* v. *The York, Newcastle, and Berwick R. C.*, 11 C. B. 655. Judgm., 6 Exch. 767.

(*k*) Judgm., 6 Exch. 767. See *Reedie*. v. *The London and North Western R. C.*, 4 Exch. 244, 257.

per medicines to a customer, or the surgeon, if he unskilfully treated a patient, would be liable to an action for misfeasance (*l*).

The general rule, that 'privity is not requisite to support an action ex delicto,' was expressly recognised and applied by the Court of Queen's Bench in *Gerhard* v. *Bates* (*m*). There, the declaration contained two counts—the one founded in contract, noticed at a former page (*n*); the other founded in tort, which, after stating the formation of a company for the purpose of smelting and refining the ores of certain Spanish mines, and that twelve thousand shares therein were to be appropriated and offered to the public at 12*s*. 6*d*. per share, alleged that the defendant, intending to defraud, deceive, and injure the public, and to cause it to be publicly represented and advertised that the said company was likely to be a safe and profitable undertaking, and also to deceive the public, who might become purchasers of the said twelve thousand shares, and to induce them to become such purchasers, falsely, fraudulently, and deceitfully caused and procured to be publicly advertised and made known, by a certain prospectus, certain false statements, by means of which the defendant wrongfully and fraudulently induced the plaintiff to become the purchaser and bearer of a large number of shares in the said undertaking, in consequence whereof he incurred loss. Against the sufficiency of this count, it was strongly urged that no privity was shewn to exist between the plaintiff and defendant, and that such privity was necessary, as the action did not arise from any public wrong, or the neglect

(*l*) *Pippin* v. *Sheppard*, 11 Price, 40; *Gladwell* v. *Steggall*, 5 Bing. N. C. 733; Judgm., 6 Exch. 767.

(*m*) 2 E. & B. 476.

(*n*) Ante, p. 328.

of any public duty. The Court, however, held, that the action was maintainable, "being founded, irrespectively of contract, upon a false representation, fraudulently made by the defendant to the plaintiff, for the purpose of inducing the plaintiff to act upon it, the plaintiff shewing that by so acting upon it he had suffered damage. Under such circumstances, although the parties be entire strangers to each other, the action lies; and it would be strange if a man who has so suffered damage from the wrongful act of another were without remedy" (*o*).

In the declaration above abstracted, it will be noticed that fraud was distinctly alleged. In *Langridge* v. *Levy* (*p*), (which is a leading case in regard to privity as an ingredient in an action of tort, and demands accordingly investigation), fraud was both alleged and proved. This remark will presently be found material. The facts in *Langridge* v. *Levy* were as follow:—The plaintiff's father purchased of the defendant a gun, warranted to have been made by a particular maker, stating at the same time that the gun was required for the use of himself and his sons. The plaintiff, having been injured by the bursting of the gun, sued the defendant for damages in an action on the case. At the trial it was proved that the gun had not, in fact, been made by the particular individual named in the warranty; and a general verdict, with heavy damages, was found for the plaintiff. The defendant having moved in arrest of judgment, the Court were called upon to decide as if the following facts had been actually found by the jury (*q*), viz. that the defendant had *knowingly* sold the

(*o*) Judgm., 2 E. & B. 491.

(*p*) 2 M. & W. 519; *S. C.* (in error), 4 Id. 337.

(*q*) See the judgment, 2 M. & W. 531.

gun in question to the father *for the purpose of being used by the plaintiff*, and had knowingly made a false warranty that this might be safely done, in order to effect the sale; and further, that the plaintiff, *on the faith of such warranty and believing it to be true*, used the gun, and thereby sustained damage. Now here it was contended, on behalf of the defendant, that there was no privity whatever between himself and the plaintiff—that there was no breach shewn of any public duty,—nor even a violation of any private right existing between the parties to the action. The Court, however, held, that the defendant, having been guilty of deceit, was responsible for its consequences whilst the instrument sold by him was in the possession of an individual to whom his fraudulent statement had been communicated, and for whose use he knew that it was purchased.

It must not, however, be inferred from the preceding case, that "wherever a duty is imposed on a person by contract or otherwise, and that duty is violated, any one who is injured by the violation of it may have a remedy against the wrongdoer" (*r*). Such a principle, if recognised, would impose an indefinite extent of liability and lead to the "most absurd and outrageous consequences" (*s*). This

(*r*) Judgm., 2 M. & W. 530.

(*s*) Per Lord *Abinger*, C. B., *Winterbottom* v. *Wright*, 10 M. & W. 114.

In *Priestley* v. *Fowler*, 3 M. & W. 1, the same experienced Judge remarks, that, if no limit were imposed on the right to sue in tort for an injury originating in contract, but without privity between the contractor and the injured party,—a master would be responsible to his servant for the defective construction of the carriage which conveyed them both,—for the negligence, consequently, of his coachmaker, of his harnessmaker, or his coachman. To prevent consequences like these, and the boundless spread of litigation which would thence ensue, we need entertain little doubt that our Courts will always strenuously incline.

With *Priestley* v. *Fowler*, supra, compare *Skipp* v. *Eastern Counties*

important limitation of the rule respecting privity is exemplified in and was fully established by the case of *Longmeid* v. *Holliday* (*t*). There, a husband and his wife sued in tort for an *injury to the wife*, caused, as the declaration alleged, by the fraudulent and deceitful warranty of a lamp sold by the defendant. Now, in this case, the warranty was made *to the husband*, the jury *negatived the existence of fraud*, and it was held that the wife could not properly be joined as a co-plaintiff in the action, because the injury to her flowed from the breach of contract, which was with the husband alone. The absence of fraud clearly distinguishes this case from *Langridge* v. *Levy*. "There is no doubt," as observed by the Court, "that if the defendant had been guilty of a fraudulent representation that the lamp was fit and proper to be used, knowing that it was not, and intending it to be used by the plaintiff's wife or any particular individual, the wife (joining her husband for conformity), or that individual, would have had an action for the deceit, upon the principle upon which all actions for deceitful representations are founded, and which was strongly illustrated in the case of *Langridge* v. *Levy* (*u*), viz. that if any one knowingly tells a falsehood, with intent to induce another to do an act which results in his loss, he is liable to that person in an action for deceit. But the fraud being negatived in this case, the action cannot be maintained on that ground by the party who sustained damage." The Court then proceed to remark that there are other cases, no doubt, besides those of fraud, in which a third person,

R. C., 9 Exch. 223. See also *Albro* v. *The Agamemnon Canal Co.*, 6 Cushing (U. S.) R. 75.

(*t*) 6 Exch. 761.

(*u*) Which case is also commented on and explained in *Howard* v. *Shepherd*, 9 C. B. 297; *Winterbottom* v. *Wright*, 10 M. & W. 109, 113; *Gerhard* v. *Bates*, 2 E. & B. 484, 491.

though not a party to the contract in question, may sue for damage sustained, if it be broken; those cases occurring, however, where, as in the examples given at p. 679, there has been a wrong done to that person, for which he would have had a right of action, though no such contract had been made.

Action for breach of duty undertaken,

Secondly, not only may a right of action ex delicto spring at once out of a contract, it may exist by virtue of the rule laid down by Mr. Smith, in his note to *Coggs* v. *Bernard* (*x*), in these terms, "the confidence induced by undertaking any service for another, is a sufficient legal consideration to *create a duty* in the performance of it."

—though gratuitously.

The rule here stated is one of much importance, and applies so as to fix with liability even an unremunerated bailee or agent, who, having actually entered on the performance of his duties, is guilty of negligence in discharging them.—The rule in question cannot however be extended, so as to render a mere gratuitous agent guilty for nonfeasance; as for instance,—in refusing to assume the office which he had voluntarily offered to assume,—the reason being that, under the circumstances now supposed, there would be no consideration at all to support the promise of the agent (*y*).

Thus,—A. is the owner of a vessel, which B. *voluntarily* undertakes to get insured; B. neglects to do so, and the vessel being lost, A. thus sustains damage through the nonperformance of his undertaking by B.,—A. will be without redress (*z*).

(*x*) 1 Smith L. C. 95, 96. See *White* v. *Humphery*, 11 Q. B 43.

(*y*) *Balfe* v. *West*, 13 C. B. 466, and cases there cited.

(*z*) So held in *Thorne* v. *Deas*, 4 Johns. (U. S.) R. 84, cited, argument, 13 C. B. 470.

To cases falling within the operation of the rule just stated, further reference will be made in connection with the law of bailments (*a*).

Right of action founded on fraud, deceit, or misrepresentation, and consequential damage.

The third class of cases to which attention must specially be drawn, pending this inquiry as to the nature of a right of action ex delicto founded on the breach of a private duty and consequential damage, has been already sufficiently indicated (*b*). It is characterised by the existence of fraud on the part of the defendant, prejudicing the plaintiff (*b*).

Fraud and deceit in the defendant, and damage to the plaintiff, it has been said, "are a sufficient foundation for the action on the case, though no benefit accrue to the defendant. The action will lie whenever there has been the assertion of a falsehood, with a fraudulent design, as to a fact, when a direct and positive injury arises from such assertion" (*c*). In any case of this kind the plaintiff's cause of action is that he has been damaged by the defendant's fraud. Simple fraud gives no cause of action, and unless the plaintiff can shew that he has been injured by it he will not succeed (*d*).

Right of action founded on the malicious doing of an act, and consequential damage.

In the fourth and last class of cases here demanding notice, the right of action ex delicto is founded upon the *malicious* doing of a wrongful act and consequential damage to the plaintiff. As in the ensuing chapter of this work an inquiry respecting the legal signification of the word 'malice' will become necessary, it will suffice for the present to refer to an action for a malicious prosecution, or for a malicious arrest, the nature whereof is hereafter con-

(*a*) Post, Chap. 3, sect. 2.

(*b*) Ante, pp. 345, 347–8. See also *Wilkin* v. *Reed*, 15 C. B. 192; *Milne* v. *Marwood*, 24 L. J., C. P., 36, which is a rather curious case.

(*c*) Judgm., *White* v. *Merritt*, 3 Seld. (U. S.) R. 356–7. See post, Chap. 4.

(*d*) Per *Parke*, B., *Price* v. *Hewett* 8 Exch. 148; ante, p. 347.

sidered (*e*), and also to the cases below cited (*f*), as indicating the precise nature of the right of action just alluded to.

Remarks as to the preceding classification of rights of action

Such being the analysis of a right of action ex delicto, and such the classification which results from it, a few remarks having reference to certain cases which at first sight may appear anomalous and not easily reducible within either of the subdivisions above specified, will scarcely be deemed out of place.

A general survey of the various causes of action founded upon tort, a minute examination of precedents, of declarations and other pleadings available in such cases, will shew that in most of them no difficulty can be felt in at once assigning to its proper class the right of action ex delicto, originating out of given facts. With regard, however, to the action of trover—actions for libel or slander,—and for wrongs done to the wife, child, or servant of the plaintiff, the following observations are submitted.

Trover

A right of action in trover, (and the same remark seems applicable to trespass de bonis asportatis and to replevin), falls, it is conceived, within the first-mentioned of the above three classes. True it is, that in this species of action the recovery of substantial damages is in practice usually sought (*g*). An action, however, in this form is in most

(*e*) Post, Chap. 2.

(*f*) *Rogers* v. *Macnamara*, 14 C B. 27, where the defendant, who had employed the plaintiff as conductor of a metropolitan stage carriage, was charged with wrongfully and *maliciously* damaging and defacing the plaintiff's license. With the above case, however, should be compared *Hurrell* v. *Ellis*, 2 C B. 295, where a declaration for a like wrong, *not averring malice*, was upheld. See also *Haddan* v. *Lott*, 15 C. B. 411.

(*g*) There seems, however, to be no reason why trover should not lie for a chattel of merely nominal value. But see *Mathew* v. *Sherwell*, 2 Taunt 439, 441.

cases brought "to establish a mere right of property" (*h*), in other words, to establish the fact that a right has been invaded or withheld; and even where the defendant brings into Court the specific thing demanded by the plaintiff, unimpaired in quality and undiminished in value, the jury may yet, it seems, give damages for the detention (*i*); at all events, they may do so where special damage is laid in the declaration (*k*).

Lord Campbell's Act.

To the first of the three preceding classes is also referable, as intimated at p. 659, the right of action for a libel or for slander, where the words spoken are actionable per se; the right of action for words actionable only when productive of special damage offering an exception to the class in question (resulting, as it would seem, from an application of the maxim de minimis non curat lex (*l*)), in respect of the necessity of proving such special damage in order to sustain the action.

Action for tort, to wife, child, or servant.

Lastly—A right of action for an injury to the wife, child, or servant of the complainant, will fall under the second or third of the above classes, according as the circumstances of the particular case disclose a breach by the defendant of a public or of a private duty. And a like remark will hold true in regard to a right of action ex delicto, which is put in suit by the personal representatives of the aggrieved party, with a view to benefiting the estate of the deceased.

Classifica-

Having thus sufficiently investigated the nature of and

(*h*) Sedgw. on Damages, 2nd ed., p. 476.

(*i*) Per Lord *Mansfield*, C. J., *Fisher* v. *Prince*, 3 Burr. 1363.

(*k*) See *Moon* v. *Raphael*, 2 Bing. N. C. 310, 315; Per *Tindal*, C. J., *Cooper* v. *Shepherd*, 3 C B. 272 (cited and commented on, per *Jervis*, C. J., *Buckland* v. *Johnson*, 15 C. B. 162), *Davis* v. *Oswell*, 7 Car & P. 804; 3 & 4 Will. 4, c. 42, s. 29.

(*l*) Leg. Max., 2nd ed., p. 105; post, Chap. 2.

tion of torts adopted in the ensuing Chapters.

ingredients in a right of action ex delicto, I shall in the ensuing chapters proceed to speak—1st, of Torts to the Person and Reputation; 2ndly, of Torts to Property, whether Real or Personal; 3rdly, of Torts not directly affecting the Person, Reputation, or Property.

Besides the convenience of the arrangement just suggested for an elementary treatise, there is, to some extent, authority for its adoption; for instance, Sir Henry Finch (*m*), tells us, that our law regards the person above his possessions,—life and liberty most,—freehold and inheritance above chattels,—and chattels real above personal.

(*m*) Discourse of Law, p. 29.

CHAPTER II.

OF TORTS TO THE PERSON AND REPUTATION.

"THE right of personal security," says Sir W. Blackstone(*a*), "consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation," to each of which he may be said to have a natural inherent right which cannot be wantonly destroyed, infringed, or restricted "without a manifest breach of civil liberty"(*b*),—laying in very many cases the foundation of an action for damages.

Torts to the person—what.

Torts to the Person, with a consideration of which this chapter may properly commence, include 1. Bodily injuries, whether direct, as assault and battery; or consequential, resulting from negligence or otherwise; 2. Injuries to the health or comfort of an individual; 3. Torts which affect personal liberty.

Action for bodily injury. Intention—whether material.

1. To the constitution of a right of action for a bodily injury, whether direct or consequential, it is material, in limine, to observe, that the existence of an evil intention in the mind of the wrong-doer is not essential. "Though a man doth a lawful thing, yet if any damage do thereby befall another, he shall answer it, *if he could have avoided it*"(*c*). And again, "trespass may sometimes lie for the consequences of a lawful act"(*d*), thus, "if a man assault me, and I lift up my staff to defend myself, and in lifting

(*a*) 1 Bla. Com. p. 129.
(*b*) 1 Bla. Com. p. 130.
(*c*) *Lambert* v. *Bessey*, T. Raym. 422; *Gibbon* v. *Pepper*, Salk. 637.
(*d*) Per *Blackstone*, J., *Scott* v. *Shepherd*, 2 W. Bla. 894.

it up [*undesignedly*] hit another, an action lies by that person; and yet I did a lawful thing"(*e*) in endeavouring to defend myself. The case of *Weaver* v. *Ward*(*f*), moreover, clearly shews that trespass will lie for a mere mischance—for an act done by the defendant *casualiter et per infortunium et contra voluntatem suam*—the accident not having been inevitable nor occasioned by the plaintiff's negligence.

Perhaps, however, the most convincing proof which can be given that our law will not excuse a person charged ex delicto by reason of the absence from his mind of any wrongful or malicious motive is this, that even a lunatic will be civilly answerable for his torts although wholly incapable of design—a doctrine flowing from the general principle already intimated, that, whenever one person receives an injury directly from the voluntary act of another, that is a trespass, although there were no design to injure(*g*).

So, to an action brought for a bodily injury, caused by negligence or want of skill, the mere absence of a design to injure will not furnish ground of defence. Although, in determining the amount of damages to be awarded to the complainant in such a case, a jury will doubtless look at all the surrounding circumstances which accompanied the doing of the act complained of, and, inter alia, at the apparent *animus* of the defendant(*h*).

Whether an act causing bodily injury to another were or were not purposely done to effect that end may, indeed, as regards the criminal liability of the actor, be most

(*e*) *Lambert* v. *Bessey*, T. Raym. 423; *Underwood* v. *Hewson*, Str. 596; *Leame* v. *Bray*, 3 East, 595, 596.

(*f*) Hobart, 134.

(*g*) *Weaver* v. *Ward*, Hob. 134; Bac. Abr. "Trespass" (G.); *Cross* v. *Andrews*, Cro. Eliz. 622.

(*h*) Post.

material. The object which purely civil procedure has in view is, however, rather the compensation of a private wrong sustained, than the punishment of a public offence.

Having premised these general remarks, I will now briefly notice the remedies afforded by our law for bodily injuries, direct or consequential.

Assault—

An *assault* may be committed without actual battery; an attempt or offer to beat another without touching him, as if one lifts up his cane or his fist in a threatening manner at another, or strikes at but misses him (*i*),—"a threat of violence exhibiting an intention to assault, and a present ability to carry the threat into execution" (*k*)—will amount in law to an assault. So also, a fortiori, does a *battery*, which includes an assault (*l*) and is described as the unlawful beating of another—the least touching of another's person, wilfully or in anger (*m*); for "the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it—every man's person being sacred, and no other having a right to meddle with it in any

and battery.

(*i*) 3 Bla. Com. 120.

(*k*) Per *Jervis*, C. J., *Read* v. *Coker*, 13 C. B. 850, 860, where various authorities upon this subject are cited; (of which see particularly *Stephens* v. *Myers*, 4 Car. & P. 349;) *Jones* v. *Wylie*, 1 Car. & K. 257; *Blake* v. *Barnard*, 9 Car. & P. 626; *Reg.* v. *St. George*, Id. 483; *Reg.* v. *James*, 1 Car. & K. 530.

In *Cobbett* v. *Grey*, 4 Exch. 744, *Pollock*, C. B., observes as follows:—"I own I have considerable doubt whether any mere threat, not in the slightest degree executed, that is, a person saying to another, 'If you do not move, I shall use such and such force,' is an assault. My impression is, that it is not. I do not know at what distance it is necessary for the party to be. No doubt, if you direct a weapon, or if you raise your fist within those limits which give you the means of striking, that may be an assault; but if you simply say, at such a distance as that at which you cannot commit an assault, 'I will commit an assault,' I think that is not an assault."

(*l*) Bull. N. P., 7th ed., 15 a.

(*m*) 3 Bla. Com. 120. As to what may constitute a battery, see also *Pursell* v. *Horn*, 8 Ad. & E. 602; *Rawlings* v. *Till*, 3 M. & W. 28.

the slightest manner"(*n*). An assault, however, must be an act done against the will of the party assaulted; it would be "a manifest contradiction in terms to say, that the defendant assaulted the plaintiff *by his permission*"(*o*). An act primâ facie amounting even to a battery is, moreover, in some cases, "justifiable or lawful, as where one who hath authority, a parent or master, gives moderate correction to his child, his scholar, or his apprentice(*p*). So also on the principle of self-defence; for if one strikes me first, or even only assaults me, I may strike in my own defence, and if sued for it may plead son assault demesne(*q*), or that it was the plaintiff's own original assault that occasioned it. So likewise, in defence of my goods or possession(*r*); if a man endeavours to deprive me of them, I may justify laying hands upon him to prevent him, and, in case he persists with violence, proceed to beat him away"(*s*). There is, however, a manifest distinction between endeavouring to turn a man out of a house or close, into which he has previously entered quietly, and resisting a forcible attempt to enter; in the first-mentioned of these cases a request being necessary;

(*n*) 3 Bla. Com. 120.

(*o*) *Christopherson* v. *Bare*, 11 Q. B. 473, 477. See *Kavanagh* v. *Gudge*, 7 M & Gr. 316; *Rex* v. *Read*, 2 Car. & K. 957.

(*p*) See *Penn* v. *Ward*, 2 Cr. M. & R. 338; *Winterburn* v. *Brooks*, 2 Car. & K. 16.

(*q*) The plea of son assault demesne states, "That the plaintiff first assaulted the defendant, who thereupon necessarily committed the alleged assault in his own defence." Com. L. Proc. Act, 1852, Sched. (B.), No. 45. See *Moriarty* v. *Brooks*, 6 Car. & P. 684.

(*r*) See *Holmes* v. *Bagge*, 1 E. & B. 782; *Roberts* v. *Tayler*, 1 C. P. 117; *Weaver* v. *Bush*, 8 T. R. 78, 81; *Hayling* v. *Okey*, 8 Exch. 531; *Gaylard* v. *Morris*, 3 Id. 695.

As to the right of the owner of land to enter forcibly thereupon, and to eject the wrongful occupant, see the cases collected, ante, Book I. Chap. 5.

As to the right of the owner of land to eject from it one who has entered under a parol license, see *Wood* v. *Leadbitter*, 13 M. & W. 838; Judgm. *Adams* v. *Andrews*, 15 Q B. 296.

(*s*) 3 Bla. Com. pp. 120-1; *Alderson* v. *Waistell*, 1 Car. & K. 358.

whereas, in the latter, it is not(*t*). Again, the captain of a vessel conveying passengers may justify an assault committed for the preservation and maintenance of due order and discipline on board(*u*). And in the exercise of an office, as that of churchwarden or beadle, a man may lay hands upon another to turn him out of church and prevent his disturbing the congregation(*x*). If sued for such or the like battery or assault(*y*), a defendant will be entitled to set forth the whole case, and plead that he laid hands upon the plaintiff gently—*molliter manus imposuit* (*z*), for the particular purpose above indicated.

Inasmuch then as an act primâ facie amounting to a battery *may* be justifiable, a battery is defined to be the *unlawful* beating of another—for which, as for an assault, the remedy is by action of trespass; the declaration wherein sets forth that the defendant 'assaulted, and beat and (if the evidence to be adduced will support such a charge) wounded the plaintiff'(*a*).

Besides an assault or battery, other torts to the person might be specified—remediable in trespass or in case, according as they are direct or consequential—the nature whereof will sufficiently appear from the references below (*b*). Other bodily injuries.

(*t*) *Polkinhorn* v. *Wright*, 8 Q. B. 197, 206; and cases cited ante, Book I. Chap. 5; *Tulley* v. *Reed*, 1 Car. & P. 6; *Jelly* v. *Bradley*, Car. & M. 270. See Arg. 3 Exch. 696; *Griffiths* v. *Dunnett*, 7 M. & Gr. 1002.

(*u*) *Noden* v. *Johnson*, 16 Q. B. 218.

(*x*) *Burton* v. *Henson*, 10 M. & W. 105; *Williams* v. *Glenister*, 2 B. & C. 699. See *Hawe* v. *Planner*, 1 Saund. 13.

(*y*) An innkeeper cannot, however, justify an assault under pretence of detaining the plaintiff for a debt due to him: *Sunbolf* v. *Alford*, 3 M. & W. 248.

(*z*) See *Oakes* v. *Wood*, 3 M. & W. 150; *Gregory* v. *Hill*, 8 T. R. 299; *Noden* v. *Johnson*, 16 Q. B. 218.

(*a*) According to the old form, the words 'insultum fecit, verberavit, vulneravit et male tractavit,' were used as significant of the cause of action.

As to pleading payment of money into Court in this action, see *Thompson* v. *Sheppard*, 4 E. & B. 53.

(*b*) As exemplifying or illustrating

In cases such as are now adverted to, three several states of facts may present themselves raising difficulty: 1st, where the plaintiff has, by his own negligence or misconduct, contributed to cause the injury sustained; 2ndly, where the defendant acted by his agent or servant in the matter charged against him; 3rdly, where the relation of master and servant, or employer and employed, existed, eo instante, as between the plaintiff and defendant. To each of the classes of cases here suggested, some few remarks, which will be found to have a wide application in connection with torts generally, shall be directed.

Where plaintiff has contributed to injury

With regard to the first of the three points just stated as likely to raise difficulty, viz. where the plaintiff has in some way himself contributed to the injury sustained, the rule is, that, "although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong" (c), and will be held in law—upon the

the nature of actions for direct bodily injuries, see *Scott* v. *Shepherd*, ante, p. 95; *Weaver* v. *Ward*, ante, p. 680, n. (g); *Leame* v *Bray*, 3 East, 593, and cases there cited; *Chandler* v. *Broughton*, 1 Cr. & M. 29; *Gilbertson* v. *Richardson*, 5 C. B. 502—for bodily injuries caused by negligence, see *Ellis* v. *The Sheffield Gas Consumers Co.*, cited ante, p. 663; *Overton* v. *Freeman*, 11 C. B. 867, and form of declaration there given, *Goldthorpe* v *Hardman*, 13 M & W. 377; *Dixon* v. *Bell*, 5 M & S. 198; *Grote* v *The Chester and Holyhead R C*, 2 Exch 251; *Moreton* v *Hardern*, 4 B. & C. 223.

As to injuries caused by mischievous or ferocious animals belonging to defendant, see *Hudson* v. *Roberts*, 6 Exch. 697; *Card* v. *Case*, 5 C. B. 622; *Jackson* v. *Smithson*, 15 M. & W. 563, *May* v. *Burdett*, 9 Q. B. 101.

(c) Per *Parke*, B., *Bridge* v. *The Grand Junction R. C.*, 3 M. & W 248, and in *Davies* v. *Mann*, 10 M. & W. 548; *Butterfield* v. *Forrester*, 11 East, 60; *Marriott* v. *Stanley*, 1 M. & Gr. 568; *Williams* v. *Richards*, 3 Car. & K. 81; post, p. 717.

As to the rule observed in the Admiralty Court in cases of collision where both parties are blameable, see *Vaux* v. *Sheffir*, 8 Moo. P. C. C. 75

principle *volenti non fit injuria*—to have disentitled himself to complain.

"Every person," however, "who does a wrong is, at least, responsible for all the mischievous consequences that may reasonably be expected to result *under ordinary circumstances* from such misconduct" (*d*); and the question, whether or not the complainant contributed to the mischief that happened, by want of ordinary caution, is necessarily one of degree, to be answered by reference to the facts adduced in evidence (*e*). If the plaintiff voluntarily incurred danger so great that no sensible man would have incurred it, he will sue in vain for compensation (*e*). If the plaintiff voluntarily places himself in a position relatively to the defendant, which he has no lawful title to occupy, he *may*, ipso facto, preclude himself from insisting that there has been negligence in this latter party productive of damage to himself (*f*).

It may be well to add, that, for an accident which happened entirely without default on the part of the defendant, or blame imputable to him, he will not be responsible (*g*); the onus, however, of establishing this defence will be cast upon the defendant, where the facts are such as raise a primâ facie case against him (*h*).

Secondly, it was observed by *Rolfe*, B., on a recent occa-

(*d*) Per *Pollock*, C. B., *Rigby* v. *Hewitt*, 5 Exch. 243, and in *Greenland* v. *Chaplin*, Id. 248.

(*e*) *Clayards* v. *Dethick*, 12 Q. B. 439, 446.

(*f*) *Lygo* v. *Newbold*, 9 Exch. 302; with which compare *Lynch* v. *Nurdin*, 1 Q. B. 29; *The Great Northern R. C.* v. *Harrison*, 10 Exch. 376; *Bird* v. *Holbrook*, 4 Bing. 628.

(*g*) Per *Dallas*, C. J., *Wakeman* v. *Robinson*, 1 Bing. 215; *Hall* v. *Fearnley*, 3 Q. B. 919; *Gibbon* v. *Pepper*, Salk. 637, 638.

(*h*) *Skinner* v. *The London, Brighton and South Coast R. C.*, 5 Exch. 787, 789; Per Lord *Denman*, C. J., *Carpue* v. *The London and Brighton R. C.*, 5 Q. B. 747. See *Templeman* v. *Haydon*, 12 C. B. 507.

Liability of master for tortious act of his servant.

sion (*i*), that "the liability of any one, other than the party actually guilty of any wrongful act, proceeds on the maxim, *qui facit per alium facit per se.* The party employing has the selection of the party employed, and it is reasonable that he who has made choice of an unskilful or careless person to execute his orders, should be responsible for any injury resulting from the want of skill, or want of care, of the person employed; but neither the principle of the rule, nor the rule itself, can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned." Upon this subject (one very comprehensive and important) of the liability of the master for the act of his servant, the two leading decisions are *Laugher* v. *Pointer* (*k*), and *Quarman* v. *Burnett* (*l*).

In *Laugher* v. *Pointer* the facts were as under mentioned:—The owner of a carriage had hired of a stable-keeper a pair of horses for his carriage for the day, the driver being provided by the owner of the horses: and it was held by Lord *Tenterden* and Mr. Justice *Littledale* (whose opinions in this case have since been recognised as law), that the owner of the carriage was not liable for an injury caused by the negligence of the driver. In this case, it must be observed, there was no evidence of any kind of contract or agreement between the owner of the carriage and the coachman who caused the injury, which circumstance is very material with reference to what is there said by the learned Judges just named. "According to the rules of law," says *Littledale*, J., "every man is answerable for injuries occasioned by his own personal negligence; and he is also answerable for acts done by the negligence of

(*i*) Judgm 4 Exch 255 (*k*) 5 B & C 547 (*l*) 6 M & W 499

those whom the law denominates *his* servants; because such servants represent the master himself, and their acts stand upon the same footing as his own. And in the present case the question is, whether the coachman, by whose negligence the injury was occasioned, is to be considered a servant of the defendant. For the acts of a man's own domestic servants there is no doubt but the law makes him responsible; and if this accident had been occasioned by a coachman who constituted a part of the defendant's own family, there would be no doubt of the defendant's liability; and the reason is, that he is hired by the master, either personally, or by those who are entrusted by the master with the hiring of servants, and he is therefore selected by the master to do the business required of him." The principle of these remarks is in truth expressed by the maxim *respondeat superior*, which applies not only to domestic servants who may have the care of carriages, horses, and other things in the employ of the family, but "extends to other servants whom the master or owner selects and appoints to do any work, or superintend any business, although such servants be not in the immediate employ or under the superintendence of the master."

Thus, "if a man is the owner of a ship, he himself appoints the master, and he desires the master to appoint and select the crew; the crew thus become appointed by the owner, and are his servants, for the management and government of the ship; and if any damage happens through their default, it is the same as if it happened through the immediate default of the owner himself (*m*). So, the same

(*m*) See *Martin* v. *Temperley*, 4 Q. B. 298; *Dunford* v. *Trattles*, 12 M. & W. 529; *Fenton* v. *The City of Dublin Steam Packet Co.*, 8 Ad. & E. 835; *Cuthbertson* v. *Parsons*, 12 C. B. 304; *Rodrigues* v. *Melhuish*, 10 Exch. 110.

principle prevails if the owner of a farm has it in his own hands, and he does not personally interfere in the management, but appoints a bailiff, or hind, who hires other persons under him, all of them being paid out of the funds of the owner, and selected by himself, or by a person specially deputed by him; if any damage happen through their default the owner is answerable, because their neglect or default is his, as they are appointed by and through him. So in the case of a mine, the owner employs a steward or manager to superintend the working of the mine, and to hire under-workmen, and he pays them on behalf of the owner. These under-workmen then become the immediate servants of the owner, and the owner is answerable for their default in doing any acts on account of their employer" (*m*). And the same kind of reasoning would manifestly apply in many other cases, as where, in the absence of any special contract or agreement between the parties (*n*), it is sought to charge a railway, or other incorporated company, for damage caused by the negligence of its officers or servants.

The judgment of the Court of Exchequer in *Sharrod* v. *The London and North Western Railway Company* (*o*) (where the plaintiff sued the defendants in trespass for driving a railway engine with great force and violence against his sheep, and so destroying them,) may usefully be cited as illustrating the remark last made, and as throwing additional light upon the extent and nature of the liability imposed upon a master for the tortious act of his servant. "The immediate act," there observed the Court, "which caused the damage to the plaintiff's cattle was the impact of a machine, which was under the control of a rational agent, the servant of the defendants; not so much so indeed

(*m*) Judgm. 5 B. & C. 551.

(*n*) See *Machu* v. *The London and South Western R. C.*, 2 Exch. 415.

(*o*) 4 Exch. 580.

as a horse or carriage drawn by horses or propelled by mechanical power along an ordinary highway would be, in which cases both the direction and the speed of the machine are under government; but still in such a degree as to make the cases similar." With regard to the point sub judice, viz. the liability of the defendants in trespass for the injury done to the plaintiff's sheep, the Court then proceeded to observe, that the case before them might be decided "as if the damage had been done by an ordinary carriage drawn by horses; and, it being now settled that an action of trespass will lie against a corporation (*p*), we may consider, for the present purpose, the defendants as one natural person, and the carriage under the care of his servants. Now the law is well established, on the one hand, that, whenever the injury done to the plaintiff results from the immediate force of the defendant himself, whether intentionally or not, the plaintiff may bring an action of trespass; on the other, that, if the act be that of the servant, and be negligent, not wilful, case is the only remedy against the master (*q*). The maxim, *qui facit per alium facit per se* renders the master liable for all the negligent acts of the servant in the course of his employment (*r*); but that liability does not make the *direct* act of the servant the *direct* act of the master. Trespass will not lie against him; case will, in effect, for employing a careless servant, but not trespass;

(*p*) *Maund* v. *The Monmouthshire Can. Co.*, 4 M. & Gr. 452; *Eastern Counties R C.* v. *Broom*, 6 Exch. 314. See *Chilton* v. *The London and Croydon R. C.*, 16 M. & W. 212.

(*q*) The principle laid down in *Laugher* v. *Pointer*, and *Quarman* v. *Burnett* (ante, p. 696), "has no bearing on an action of trespass, in which a party may be liable as a co-trespasser for the immediate act of another, though that other be not his servant."—Per *Cresswell*, J., *M'Laughlin* v. *Pryor*, 4 M. & Gr. 61.

(*r*) See, however, *Dansey* v. *Richardson*, 3 E. & B. 144

unless, as was said by the Court in *Morley* v. *Gaisford* (*r*), the act was done '*by his command;*' that is, unless either the particular act which constitutes the trespass is ordered to be done by the principal, or some act which comprises it; or some act which leads by a physical necessity to the act complained of. The former is the case where one as servant is ordered to enter a close to try a right, or otherwise; the latter, when such a case occurs as *Gregory* v. *Piper* (*s*), where the rubbish, ordered to be removed, from a natural necessity fell on the plaintiff's soil; but when the act is that of the servant in performing his duty to his master, the rule of law we consider to be, that case is the only remedy against the master, and then only is maintainable when that act is negligent or improper; and this rule applies to all cases where the carriage or cattle of a master is placed in the care and under the management of a servant, a rational agent (*t*). . . . . In all cases where a master gives the direction and control over a carriage, or animal, or chattel to another rational agent, the master is only responsible in an action on the case for want of skill or care of the agent" (*u*).

The foregoing extracts from the judgment in *Sharrod* v. *The London and North Western Railway Company* have been given, not so much with a view to illustrating the rather technical distinction between case and trespass, as for the purpose of indicating various and dissimilar states of

(*r*) 2 H. Bla. 442.

(*s*) 9 B. & C. 591; there a master ordered his servant to lay down a quantity of rubbish near his neighbour's wall, but so that it might not touch the same; the servant used ordinary care in executing this order, but some of the rubbish naturally ran against the wall; the master was held liable in trespass.

(*t*) Judgm. 4 Exch. 586.

(*u*) Id. ibid.; *M'Manus* v. *Crickett*, 1 East, 106; Per *Parke*, B., *Gordon* v. *Rolt*, 4 Exch. 366.

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facts under which respectively a master may be answerable ex delicto for the acts of his servant (*x*). The general grounds of this liability are indeed sufficiently stated in *Laugher* v. *Pointer* (*y*), and in *Quarman* v. *Burnett* (*z*), where it is said, "upon the principle that *qui facit per alium facit per se*, the master is responsible for the acts of his servant; and that person is undoubtedly liable, who stood in the relation of master to the wrong-doer,—he who had selected him as his servant from the knowledge of or belief in his skill and care,—and who could remove him for misconduct (*a*), and whose orders he was bound to receive and obey; and whether such servant has been appointed by the master directly, or intermediately through the intervention of an agent authorised by him to appoint servants for him, can make no difference. But the liability, by virtue of the principle of relation of master and servant, must cease where the relation itself ceases to exist."

Hence, when he who does the wrongful act, either in person or by his servant, exercises an *independent employment*, his immediate superior will not be liable; as in *Milligan* v. *Wedge* (*b*), where damage was done by a bullock through the careless driving of a boy employed by the drover, who was himself in the employment of the butcher, to whom liability was accordingly held not to attach; or in *Rapson* v. *Cubitt* (*c*), where the injury complained of was

(*x*) See, also, *Giles* v. *The Taff Vale R. C.*, 2 E. & B. 822.

(*y*) Ante, p. 696.

(*z*) 6 M. & W. 499.

(*a*) The mere fact that a railway company has, by agreement with one who has contracted to make a portion of the line, power to remove his workmen for incompetence, will not suffice to create the relation of master and servant between the company and the workmen. In this case the contractor would be the master *Reedie* v. *The London and North Western R. C.*, 4 Exch 244.

(*b*) 12 Ad. & E. 737.

(*c*) 9 M. & W. 710.

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done by the negligence of the servant of a gas-fitter employed by the defendant, a builder, who had himself contracted to make certain alterations in a club-house,—and who, it was held, could not be made responsible for the damage thus occasioned; or in *Overton* v. *Freeman* (*d*), where the facts were as follow:—the defendants had been employed by certain paving commissioners to pave a particular district, and contracted with B. to pave one of the streets included in such district. B.'s workmen, whilst paving the street, left a heap of stones at night in so unsafe a position, that the plaintiff fell over it and sustained an injury. There was no evidence to shew that the defendants had interfered in or sanctioned the placing of the stones; and it appeared that B. was in reality acting under the direction of the engineer and surveyor of the commissioners. Upon these facts the defendants were held not liable; for "the relation of master and servant," observed *Maule*, J., "has no existence in a case like this. . . . . I think the present case falls within the principle of those authorities which have decided that the sub-contractor, and not the person with whom he contracts, is liable civilly, as well as criminally, for any wrong done by himself or his servants in the execution of the work contracted for" (*e*).

But although it is established by *Laugher* v. *Pointer*, and *Quarman* v. *Burnett*, that, if the owner of a carriage hires horses of a stable-keeper, who provides a driver,

(*d*) 11 C. B. 867, where many authorities upon the subject above alluded to are collected; of which see particularly *Knight* v. *Fox*, 5 Exch. 721; *Burgess* v. *Gray*, 1 C. B. 578, *Reedie* v. *The London and North Western R. C.*, 4 Exch. 244. See also *Peachey* v. *Rowland*, 13 C. B. 182.

(*e*) See, further, in illustration of the above remarks: *Cuthbertson* v. *Parsons*, 12 C. B. 304; *Allen* v. *Hayward*, 7 Q. B. 960; *Duncan* v. *Findlater*, 6 Cl. & F. 894, 904, followed in *Thomson* v. *Mitchell*, 7 Id. 564.

through whose negligence an injury is done, the driver must in general be considered as the servant of the stable-keeper or job-master,—the conclusion of law will, nevertheless, be different if there be special circumstances in the case shewing an assent, either express or implied, to the tortious act complained of by the party hiring the horses (*f*), or shewing that the individual whom it is sought to charge, had control over the servant whose act caused damage, and was in fact *dominus pro tempore* (*f*); and the same general principle applies where the carriage and horses are borrowed for the day (*g*); though a person hiring or borrowing a carriage, and providing horses and servants, would be liable (*h*).

Further, where the injury in question was committed by the defendant's servant *wilfully*, whilst not employed in the master's service, and whilst not acting within the scope of his authority, a remedy cannot be had against the master—the servant only will be liable (*i*); as if, for instance, a servant authorised merely to distrain cattle damage feasant, drives cattle from the highway into his master's close, and there distrains them (*k*); or if he wantonly, and in order to effect some purpose of his own, strikes the plaintiff's horses, and thereby causes an accident (*l*). Should, indeed, the servant

(*f*) *M'Laughlin* v. *Pryor*, 4 M. & Gr. 48; *S. C.* 1 Car. & M. 354.

(*g*) See *Hart* v. *Crowley*, 12 Ad. & E. 378; *Taverner* v. *Little*, 5 Bing. N. C. 678; *Stables* v. *Eley*, 1 Car. & P. 614; *Wheatley* v. *Patrick*, 2 M. & W. 650.

(*h*) *Croft* v. *Alison*, 4 B. & Ald. 590; *Scott* v. *Scott*, 2 Stark. N. P. C. 438.

(*i*) *Lyons* v. *Martin*, 8 Ad. & E. 512; *M'Manus* v. *Crickett*, 1 East, 106; *Leame* v. *Bray*, 3 East, 593; *Middleton* v. *Fowler*, 1 Salk. 282; *Lamb* v. *Palk*, 9 Car. & P. 629.

(*k*) *Lyons* v. *Martin*, 8 Ad. & E. 512.

(*l*) *Croft* v. *Alison*, 4 B. & Ald. 590, 592; *Lamb* v. *Palk*, 9 Car. & P. 629; *Gregory* v. *Piper*, 9 B. & C. 591; *Huzzey* v. *Field*, 2 Cr. M. & R. 432; Per *Erle*, J., *Freeman* v. *Rosher*, 13 Q. B. 785.

be guilty of negligence, productive of an injury to the plaintiff, whilst on his master's business, as when driving his master's carriage, although he may at the time be going out of the direct road for some purpose of his own, the master may be answerable (*m*). "No doubt," observes *Jervis*, C. J., in a recent case (*n*), "a master may be liable for injury done by his servant's negligence, where the servant, being about his master's business, makes a small deviation, or even where he so exceeds his duty as to justify his master in at once discharging him," but "at all events, if the master is liable where the servant has deviated, it must be where the deviation occurs in a journey on which the servant has originally started on his master's business; in other words, he must be *in the employ* of his master at the time of committing the grievance." No liability attaches to the master if the servant, without his leave or knowledge, take his carriage, and with it commit an injury, because in this case the master has not intrusted the servant with the carriage, or commissioned him to perform any service (*o*).

It seems, moreover, true, as a general proposition, that, where one employs another to do an act which may be done in a lawful manner, and the latter, in doing it, unnecessarily commits a public nuisance, whereby injury results to a third person, the employer will not be responsible for such injury (*p*). If, however, A. employs B., a contractor, to do an unlawful act—ex. gr. to erect a nuisance in the public

(*m*) *Joel* v. *Morison*, 6 Car. & P. 501; *Sleath* v. *Wilson*, 9 Car. & P. 607.

(*n*) *Mitchell* v *Crassweller*, 13 C. B. 237, 245.

(*o*) *Mitchell* v. *Crassweller* supra; *Sleath* v. *Wilson*, 9 Car. & P. 607; *Lamb* v. *Palk*, Id. 629; *Goodman* v. *Kennell*, 3 Car. & P. 167; *Joel* v. *Morison*, 6 Car. & P. 501.

(*p*) *Peachey* v. *Rowland*, 13 C. B. 182; with which compare *Sadler* v. *Henlock*, 24 L. J., Q. B., 138.

highway—which B. does by his work-people and servants, A. will be answerable in an action of tort for damage thence resulting to a third party (*q*). The two preceding propositions are clearly in accordance with the dictates of common sense, as well as sustainable by the authorities cited in support of them.

Liability attaching to owner of realty.

It should here, perhaps, be noticed, that cases are to be found in the books which seem to shew that wider liability attaches to the owner of *real* than to the owner of *personal* property in respect of an injury resulting from its negligent management (*r*). It may, however, be considered as settled, that no such distinction as here adverted to does in truth exist; unless perhaps in cases where the act complained of amounts in law to a nuisance, and where the owner of the premises whereon the nuisance is erected is himself in occupation of them, or has in some manner participated in or expressly sanctioned the erection of the nuisance.

If a landlord lets premises not in themselves a nuisance, but which may or may not be used by the tenant so as to become a nuisance, and it is entirely at the option of the tenant so to use them or not, and the landlord receives the same benefit whether they are so used or not, the landlord cannot be made responsible for the acts of the tenant, and à fortiori he would not be liable if he had taken an obligation from the tenant not to use them so as to create a nuisance, even without reserving a right to enter and abate a nuisance if created (*s*).

(*q*) *Ellis* v. *The Sheffield Gas Consumers' Co.*, 2 E. & B 767.

(*r*) See *Bush* v. *Steinman*, 1 B & P. 404, Judgm. 4 C. B. 800, 801; Per *Littledale*, J., 5 B. & C. 559, 560, Judgm. 6 M. & W. 510; *Leslie* v. *Pounds*, 4 Taunt. 649. *Randleson* v. *Murray*, 8 Ad. & E 109, and *Burgess* v. *Gray*, 1 C. B. 578, may be supported without any reference to the distinction above alluded to.

(*s*) Judgm. *Rich* v. *Basterfield*, 4 C. B. 804-5.

In *Reedie* v. *The London and North Western R. C.* (*t*), the Court observes, with reference to the point above mooted, as follows:—"It is not necessary to decide whether, in any case, the owner of real property, such as land or houses, may be responsible for nuisances occasioned by the mode in which his property is used by others not standing in the relation of servants to him, or part of his family. It may be that in some cases he is so responsible. But then his liability must be founded on the principle that he has not taken due care to prevent the doing of acts which it was his duty to prevent, whether done by his servants or others. If, for instance, a person occupying a house or a field should permit another to carry on there a noxious trade, so as to be a nuisance to his neighbours, it may be that he would be responsible, though the acts complained of were neither his acts nor the acts of his servants. He would have violated the rule of law, *sic utere tuo, ut alienum non lædas*" (*u*). If however A., the owner of land, contracts with B. to do work or to erect buildings upon it, and B.'s workmen do an injury to the owner of the adjoining land by carrying away materials belonging to him, A. will not, unless he interfered in the tortious transaction, be responsible for it (*x*).

Thus far has been discussed the liability of a master for the tortious act of his servant—of the employer for the tortious act of the employed—where there is evidence adducible of an authority to do the act in question, either express, or implied from the relation which exists between the actual wrongdoer and the party charged. I propose, in the next place, to inquire as to the effect of ratifying or adopting a

(*t*) 4 Exch. 244.

(*u*) Judgm. 4 Exch. 256—257; Judgm. *Rich* v. *Basterfield*, 4 C. B. 802. See *Gott* v. *Gandy*, 23 L. J., Q. B., 1.; *S. C.*, 2 E. & B. 845; *Alston* v. *Grant*, 3 E. & B. 128.

(*x*) *Gayford* v. *Nicholls*, 9 Exch. 702.

wrongful act, as regards the liability of him who thus ratifies or adopts it.

Effect of ratification of a tort.

Now, as on the one hand it is true, that, "if a servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it, though the servant is not thereby excused, for he is only to obey his master in matters that are honest and lawful" (*y*); so, also, "he that receiveth a trespasser, and agreeth to a trespass after it be done, is no trespasser, *unless the trespass was done to his use or for his benefit;* and then his agreement subsequent amounteth to a commandment" (*z*). The main question in regard to liability by ratification will, accordingly, be this—was the tortious act, alleged to have been ratified, originally intended to be done to the use or for the benefit of the party who is said to have subsequently ratified it? If so, the party ratifying the antecedent act will be liable in respect of it; ex. gr., a corporation may thus become liable for an assault committed by their servant (*a*).

The doctrine of 'ratihabitio' is, however, unquestionably of more difficult application in reference to torts than in reference to contracts (*b*). If A. B., *professing to act by my authority,* does that which primâ facie amounts to a trespass, and I afterwards assent to and adopt his act, there he is treated as having from the beginning acted by my authority, and I become a trespasser, unless I can *justify* the particular act which is to be deemed as having been

(*y*) 1 Bla. Com. 430; *Sands* v. *Child*, 3 Lev. 352; *Jones* v. *Hart*, 1 Ld. Raym. 738; *Britton* v. *Cole*, 1 Salk. 408; *Stephens* v. *Elwall*, 4 M. & S. 258.

(*z*) 4 Inst. 317; *Wilson* v. *Barker*, 4 B. & Ad. 614.

(*a*) *The Eastern Counties R. C.* v. *Broom*, 6 Exch. 314 See *Roe* v *The Birkenhead, Lancashire, and Cheshire Junction R. C.*, 7 Exch. 36, 40.

(*b*) Ante, p° 315.

done with my previous sanction (c). In this case the party ratifying becomes, as it were, a trespasser *by estoppel*—at all events—he is precluded from denying that he gave antecedent authority for that act which he afterwards admits himself to have authorised (c).

An apt instance of the effect of a ratification of a tort presents itself in *Hull* v. *Pickersgill* (d). There the plaintiff, an uncertificated bankrupt, sued the defendants in trespass for breaking open his house, and seizing goods belonging to him acquired since the bankruptcy. Now in this case it appeared that the defendants had become creditors of the plaintiff whilst uncertificated; that at the time of the seizure they did not even know who were the assignees under the bankruptcy; but that, after the action had been commenced, and before plea pleaded, they (the defendants) obtained a surrender from the assignees of their interest in the effects seized. It was held, that this surrender had a retrospective operation, so as to protect the defendants by clothing them with the rights and title of the assignees. "The rule of law," said *Dallas*, C. J. (e), "is, that he, for whom a trespass is committed, is no trespasser unless he agrees to the trespass; but if he afterwards agrees to it, his subsequent assent has relation back, and is equivalent to a command, according to the well-established maxim *omnis ratihabitio retrotrahitur et mandato priori æquiparatur.*" It may be proper to direct attention specifically to one point which was urged on behalf of the plaintiff in *Hull* v. *Pickersgill*, viz.—that the defendants had not assumed to act at the time of making their seizure *for the benefit of* the assignees. To

(c) See the Judgm. *Bird* v. *Brown*, 4 Exch. 799.

(d) 1 Br. & B. 282. See *Heslop* v. *Baker*, 8 Exch. 411.

(e) 1 Br. & B. 286.

this, however, it was answered, that every presumption was to be made against a plaintiff circumstanced as above described; and further, that the subsequent application to the assignees for their assent to what had been done, "was a recognition by the defendants as well of the assignees' interest in the property, as that these interests had been remembered in the seizure."

In *Wilson* v. *Tumman* (*f*), the rule now under notice is fully and elaborately stated, in these words:—"That an act done *for another* by a person not assuming to act for himself but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by—and with all the consequences which follow from—the same act done by his *previous* authority." But this is not so where the actual wrongdoer at the time of committing the tort in question assumed to act for himself only, and not as agent for or as servant of another; so that if a bailiff take a heriot, claiming property in it himself, the subsequent agreement of the lord would not amount to a ratification of his authority as bailiff at the time; but if he took it at the time *as bailiff* of the lord, the subsequent ratification by the lord would make him bailiff at the time (*g*).

The distinction here insisted upon is practically important. If, for instance, a judgment creditor issues execution

(*f*) 6 M. & Gr. 236, 242-3; Per *Coltman*, J., *Walker* v. *Hunter*, 2 C. B. 334; *Wright* v. *Crookes*, 1 Scott, N. R. 685.

(*g*) Judgm. 6 M. & Gr. 243.

against his debtor, and directs the sheriff acting under the writ to seize goods belonging to some third party, such previous direction would undoubtedly make the execution creditor a trespasser; because all who procure a trespass to be done are trespassers themselves, and the sheriff would be supposed not to have taken the goods merely under the authority of the writ, but as the servant of the execution creditor. If, on the other hand, we suppose that the sheriff, acting under a valid writ by the command of the Court, and as the servant of the Court, seizes the wrong person's goods, a subsequent declaration by the plaintiff in the original action, ratifying and approving the taking, would *not* suffice to alter its original character, and make it a wrongful taking by the execution creditor (*h*).

The case of *Lewis* v. *Read* (*i*), is well worthy of notice in connection with this subject, viz., as to the effect of ratifying a tort. There a landlord authorised bailiffs to distrain for rent due to him from his tenant of a farm, expressly directing them not to take anything except on the demised premises. The bailiffs, however, distrained cattle belonging to another person (supposing them to be the tenant's), beyond the boundary of the farm. The cattle were sold, and the landlord received the proceeds. Upon these facts the Court of Exchequer held, that the landlord was not liable in *trover* for the value of the cattle, *unless* it were found by the jury that he had ratified the acts of the bailiffs *with knowledge of the irregularity;* or unless it were found that he chose, without inquiry, to take the risk upon himself, and to adopt the whole of their acts. Hence, we may infer that a principal will not be liable in trespass for the act of his agent,

(*h*) Judgm. 6 M. & Gr. 244. (*i*) 13 M. & W. 834.

unless he either authorised it beforehand, or subsequently assented to it with knowledge of what had been improperly done (*k*).

Further: the case of *Buron* v. *Denman* (*l*), tried at bar before the Court of Exchequer, is important, as shewing the effect of the ratification of an act, primâ facie tortious, done by an agent; and although it was there held, that the party who had ultimately ratified the trespass could not be made responsible for it, yet the general effect, operation, and applicability of the doctrine of ratihabitio were judicially admitted and recognised. In the case just cited, the facts were these:—the action, which was in trespass, was brought by a slave-dealer, resident on the coast of Africa, and there carrying on his trade, against a commander in the British navy on that station, whose duty it was to enforce the provisions of a certain treaty between our own and the Spanish Government, for the suppression of the Slave-trade. The gist of the action was, that the defendant had committed a trespass in destroying the property, and carrying off the slaves of the plaintiff; and in answer to this charge the defendant put on the record a series of pleas, by some of which he justified the alleged torts as having been done by command of the Crown,—a defence which, if established, would be good on grounds of *general policy*, which protects the servants of the public from liability in respect of any acts done by them in the regular course of discharging their official duties (*m*). The principal question to be decided in *Buron* v. *Denman*, accordingly, was, whether the conduct

(*k*) *Freeman* v. *Rosher*, 13 Q. B. 780.

(*l*) 2 Exch. 167.

(*m*) See *Johnstone* v. *Sutton*, 1 T. R. 510; Per *Buller*, J., *Macbeath* v. *Haldimand*, 1 T. R. 182; and cases cited, Broom's Pract. vol. 1, pp. 585 et seq.

of the defendant in carrying away the slaves, and committing the other alleged trespasses, could be justified as an act of state, done by authority of the Crown? It was not, indeed, contended that there was any previous authority for the acts complained of. The justification of the defendant depended upon an alleged subsequent ratification of his acts. Now, in this case, there was ample evidence to shew that the Government had expressed their approval, and intimated their adoption of the acts of the defendant, and it consequently only remained to consider, whether the rule of law applicable amongst private individuals, in regard to the effect of ratification, applied also to the Crown. The Court held that it did so apply; and that the defendant was accordingly justified in what he had done, whilst acting in the public service.

As, on the one hand, liability may be incurred by the adoption of a tortious act antecedently done, so, on the other hand, may benefit in some cases be derived from the ratification of an act primâ facie and ostensibly wrongful; thus,—where an act, which if unauthorised would amount to a trespass, has been done in the name and on the behalf of another, though without previous authority from him, his subsequent ratification may enable the party on whose behalf the act was done to take advantage of it, and to treat it as having been done by his direction. But this doctrine must be taken with the qualification, that the act of ratification take place at a time and under circumstances when the ratifying party *might himself have lawfully done the act which he ratifies* (*n*).

(*n*) Judgm. *Bird* v. *Brown*, 4 Exch. 798--9, where some cases are cited illustrating the above doctrine.

The conclusions arrived at in the preceding pages, with reference to the doctrine of ratification, may thus briefly be presented:—

1. If A. commit a trespass, whether to the person or to property, professing at the time to act on behalf of B., though without authority from him, and B. afterwards knowingly ratify the trespass, B. may thus be rendered liable for it.

2. If A. does a tortious act, either on behalf of himself or as agent for B., and C., with whom A. has had no previous communication in regard to it, afterwards ratifies or adopts the act, C. will not, by so ratifying or adopting it, incur liability ex delicto in respect of it.

3. One who adopts and ratifies an act done in his name or on his behalf, though without previous authority from him, may thereby enable himself to take advantage of the act done, provided he could himself lawfully have done it at the time when in fact it was performed.

Liability of master to servant for injury sustained by latter in his service.

Thirdly, the principle, upon which a master is in general liable to answer for accidents resulting from the negligence or unskilfulness of his servant, clearly does not apply to protect the servant guilty of such negligence or want of skill against the claim of a third party who has been injured thereby (*o*). Nor, if the servant by his own unskilfulness sustain injury, can he claim damages from his master, upon an allegation that his own negligence was in point of law the negligence of his master (*p*). Where, moreover, several servants possessed of competent or reasonable care and skill are employed by the same master, and injury results to one of them from the negligence of another fellow-servant, the master is not in general responsible. "Put the case," ob-

(*o*) Ante, p. 707.

(*p*) Judgm. 5 Exch. 350.

serves the Court of Exchequer (*q*), after laying down the foregoing propositions, "of a master employing A. and B., two of his servants, to drive his cattle to market. It is admitted, that, if by the unskilfulness of A. a stranger is injured, the master is responsible. Not so if A. by his unskilfulness hurts himself; he cannot treat that as the want of skill of his master. Suppose, then, that, by the unskilfulness of A., B. the other servant is injured, while they are jointly engaged in the same service, there we think B. has no claim against the master. They have both engaged in a common service, the duties of which impose a certain risk on each of them; and, in case of negligence on the part of the other, the party injured knows that the negligence is that of his fellow-servant, and not of his master. He knew, when he engaged in the service, that he was exposed to the risk of injury, not only from his own want of skill or care, but also from the want of it on the part of his fellow-servant; and he must be supposed to have contracted on the terms that, as between himself and his master, he would run this risk" (*r*).

But although a master is not in general responsible to one servant for an injury occasioned to him by the negligence of a fellow-servant while they are acting in one common service, yet this rule must be received with the qualification that the master shall have taken due care not to expose his servant to unreasonable risks (*s*);—ex. gr. The servant when he engages to run the risks of his service, includ-

(*q*) Judgm. *Hutchinson* v. *The York, Newcastle, and Berwick R. C.*, 5 Exch. 351; Acc. *Wymore* v. *Jay*, Id. 354; *Skipp* v. *Eastern Counties R. C.*, 9 Exch. 223, *Priestley* v. *Fowler*, 3 M. & W. 1, *Farwell* v. *Boston and Worcester Railroad Corporation*, 4 Metcalf (U. S.) R 49.

(*r*) See *Skipp* v. *Eastern Counties R. C.*, 9 Exch. 223; *Priestley* v. *Fowler*, 3 M. & W. 1; *Winterbottom* v. *Wright*, 10 M. & W. 109, cited per *Coleridge*, J., 2 E. & B. 253.

(*s*) See *Marshall* v. *Stewart*, H. L., March 13th, 1855.

ing those arising from the negligence of fellow-servants, has a right to understand that the master has taken reasonable care to protect him from such risks by associating him only with persons of ordinary skill and care (*t*).

Neither would a master be exempt from responsibility to his servant for an injury occasioned to him by the act of another servant, where the servant injured was not, at the time of the injury, acting in the service of his master. In such a case, the servant injured is substantially a stranger, and entitled to all the privileges which he would have had if he had not been a servant (*u*).

Action for compensation, where death has been caused by negligence.

Prior to the stat. 9 & 10 Vict. c. 93, intituled "An Act for compensating the families of persons killed by accidents," an action was not maintainable against one who by his negligence occasioned the death of another, for in such a case the rule of law applied—*actio personalis moritur cum personâ* (*v*). By sect. 1, however, of that statute, it is enacted, that "whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony" (*x*). By sect. 2 of the statute above mentioned, it is further enacted, that "every such

(*t*) Judgm. 5 Exch. 353.

(*u*) Judgm. 5 Exch. 352.

(*v*) Leg. Max. 2nd ed. p. 702. See also per *Parke*, B., *Armsworth* v. *The South Eastern R. C.*, 11 Jur. 758.

(*x*) As to the suspension of the right of action in this case at common law, see ante, p. 101.

action shall be for the benefit of the wife, husband, *parent*(*y*), and *child*(*z*) of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct." Sect. 3, of the same statute, further enacts, "that not more than one action shall lie for and in respect of the same subject-matter of complaint; and that every such action shall be commenced within twelve calendar months after the death of such deceased person;" and in every action brought under the Act, it is required (sect. 4), that the plaintiff on the record shall, together with the declaration, "deliver to the defendant or his attorney, a full particular of the person or persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered"(*a*).

Now the rules of law applicable in actions brought by personal representatives under the above statute are identical with those applicable in actions of tort brought for

(*y*) By sect. 5, the word 'parent' shall include father and mother, and grandfather and grandmother, and stepfather and stepmother.

(*z*) By sect. 5 the word 'child' shall include son and daughter, and grandson and granddaughter, and stepson and stepdaughter.

(*a*) See a form of declaration under this Act: *Barnes* v. *Ward*, 9 C. B. 392.

bodily injuries at suit of the injured parties themselves(*b*). If the deceased by his own negligence or carelessness materially contributed to the accident(*c*), his representatives will not be entitled to recover. Should it be contended that the actual wrongdoer stood in the relation of servant to the defendant, with a view to casting liability upon the latter, and should it appear that in fact such relation did not exist between them, but that some link in the chain which had been relied upon as connecting them together was in truth wanting, the action brought for compensation will not be sustainable(*d*). Further, if it be shewn that the injury which caused death was occasioned by the negligence of the deceased's fellow-servant in the course of their common employ, such latter person being possessed of competent care and skill(*e*), a like result will follow.

In an action founded upon the statute before us (the operation whereof, it will be noticed, is confined to cases in which *death* has been caused by negligence), the measure of damages is not the loss or suffering of the deceased but the injury resulting to his family from his death; nor can the jury, in assessing the amount of compensation to be awarded to the persons on whose behalf the claim to it is put forward, take into consideration the mental anguish sustained by them(*f*).

(*b*) *Tucker* v. *Chaplin*, 2 C. & K. 730; *Barnes* v. *Ward*, 9 C. B. 392; *Dakin* v. *Brown*, 8 C. B. 92.

(*c*) *Thorogood* v. *Bryan*, 8 C. B. 115; *Cattlin* v. *Hills*, Id. 123. See *Holden* v. *The Liverpool Gas Co.*, 3 C. B. 1; *Flower* v. *Adam*, 2 Taunt. 314; and cases ante, pp. 694—5.

(*d*) *Reedie* v. *The London and North Western R. C.*, and *Hobbit* v. *The Same*, 4 Exch. 244.

(*e*) *Hutchinson* v. *The York, Newcastle, and Berwick R. C.*, 5 Exch. 343; *Wigmore* v. *Jay*, Id. 354.

(*f*) *Blake* v. *The Midland R. C.*, 21 L. J., Q. B., 233. And see an article on the measure of damages in cases such as are above adverted to: Jur. vol. 18, p. 1, (citing *Groves* v. *The London and Brighton R. C.*, cor. *Jervis*, C. J., Dec. 15, 1852.)

Torts to the health and comfort of individuals.

2. Following the arrangement specified at p. 689, I propose, in the next place, to speak of torts to the health and comfort of individuals, which are clearly to be included under the general head of Torts to the Person. Injuries affecting the health of an individual, civilly cognisable by Courts of law, may be committed in various ways, ex. gr.—Where, "by any unwholesome practices of another, a man sustains any apparent damage in his vigour or constitution. As by selling him bad provisions or wine; by the exercise of a noisome trade which infects the air in his neighbourhood; or by the neglect or unskilful management of his physician, surgeon, or apothecary. For it hath been solemnly resolved, that mala praxis is a great misdemeanor and offence at common law, whether it be for curiosity and experiment or by neglect; because it breaks the trust which the party had placed in his physician and tends to the patient's destruction"(*g*).

Sale of unwholesome food.

Treating very briefly of the various torts to the health and comfort of individuals in the order indicated in the above passage, I may first observe, that, in *Burnby* v. *Bollett*(*h*), a question raised as to the civil liabilities of a butcher, who sells meat unfit for human food, was learnedly discussed; and the conclusion there come to was, that victuallers, butchers, and other common dealers in provisions, are not merely in the same situation as dealers in other commodities, and liable under the same circum-

(*g*) 3 Bla. Com. 122, citing *Dr. Groenvelt's case*, 1 Ld. Raym. 214.

Mr. Chitty also says (Gen. Pract. vol. 1, p. 42), "The health of an individual may be injured by a public or private nuisance, as by breaking quarantine, by sale of unwholesome food, by want of due care in medical practitioners, or by sudden alarms affecting the nervous system."

(*h*) 16 M. & W. 644. See also *Couch* v. *Steel*, 3 E. & B. 402.

stances as they are, so that if an order be sent to them to be executed, they are presumed to undertake to supply a good and merchantable article; but *they* are also liable to punishment for selling corrupt victuals by virtue of an ancient statute (certainly if they do so *knowingly*, and probably if they do not,) and are therefore responsible civilly to those customers to whom they sell such victuals, for any special or particular injury by the breach of the law which they thereby commit (*i*).

Nuisances affecting health.

In the next place, as regards *nuisances* calculated injuriously to affect the health or comfort of individuals,—the distinction between a *public* and a *private* nuisance must here carefully be kept in view,—the mode of procedure for the abatement of the former being different from that available to an individual in respect of the latter.

Public nuisance.

To constitute a public nuisance, the thing complained of must be "such as in its nature or its consequences is a nuisance—an injury or a damage to all persons who come within the sphere of its operation, though it may be so in a greater degree to some, than it is to others" (*k*). For example: if, during the operation of a manufactory, volumes of noxious smoke or of poisonous effluvia are emitted; to persons who are at all within the reach of these operations, a nuisance, in the popular sense of the term, is committed; although to those who are nearer to the manufactory in question the nuisance and inconvenience caused by it may be greater than it is to those who are more remote from it. So the stopping of the King's highway is a nuisance to all who may have occasion to travel upon that highway; it may be a much greater nuisance to a person who has to

(*i*) Judgm. 16 M. & W. 654; 4th Inst. 261; Chitt. Gen. Pract. vol. 1, pp. 42-3.

(*k*) Per *Kindersley*, V. C., *Soltau* v. *De Held*, 2 Sim. N. S. 142.

travel along it every day than it is to an individual who has to travel along it only once a year; but it is more or less a nuisance to every one who has occasion to use it—it is a 'public' nuisance(*l*).

Private nuisance.

If, however, the thing complained of is such that it is a nuisance to those who are more immediately within the sphere of its operation, but is no nuisance or inconvenience whatever, or is even advantageous or pleasurable to those who are more removed from it, there the matter in question does not properly come within the meaning of the term 'public' nuisance(*m*). Thus, a peal of bells may be an intolerable nuisance to one who lives very close to them, whilst to a person who resides at a distance from them the sound thereby produced may be pleasurable(*m*).

It does not, then, follow, because a thing complained of is a nuisance to several individuals, that it is therefore a public nuisance, ex. gr.—if a man by building up a wall

(*l*) Judgm. 2 Sim. N. S. 143.

In regard to the question—what is a public nuisance? see also *The Att.-Gen.* v. *Sheffield Gas Consumers Co.*, 3 De G. M. & G. 304; *Crowder* v. *Tinkler*, 19 Ves. 617; *Thorne* v. *The Taw Vale R. C.*, 13 Beav. 10, 21; *Bostock* v. *The North Staffordshire R. C.*, 5 De G. & S. 584.

It may be stated generally that, "where a statute prohibits the doing of a particular act affecting the public, no person has a right of action against another merely because he has done the prohibited act. It is incumbent on the party complaining to allege and prove that the doing of the act prohibited has caused him some special damage, some peculiar injury beyond that which he may be supposed to sustain in common with the rest of the Queen's subjects by an infringement of the law. But where the act prohibited is obviously prohibited for the protection of a particular party, there it is not necessary to allege special damage:" *Chamberlaine* v. *The Chester and Birkenhead R. C.*, 1 Exch. 870, 876-7. The reason on which this rule is founded seems to be, that inasmuch as the statute recognises the right of the plaintiff, the breach of that recognised right gives him a title to sue without shewing special damage, in accordance with the principle stated ante, pp. 659, 660.

(*m*) *Soltau* v. *De Held*, 2 Sim. N. S. 133, 143.

darkens the ancient windows of several different dwelling-houses, he is not in thus acting necessarily guilty of a public nuisance (*n*).

Remedy in either of the above cases.

Now in the case of a *public* nuisance the remedy at law is by indictment, the remedy in equity is by information at the suit of the Attorney-General. In the case of a *private* nuisance, the remedy at law is by action; the remedy in equity is by bill (*o*). Where, indeed, that which is a public nuisance is also a private nuisance to an individual by inflicting on him some special or particular damage, the individual thus specially aggrieved may have his private remedy at law by action or in equity by bill (*p*).

From the foregoing remarks will be inferred the extreme importance of determining the true nature of an alleged nuisance prior to advising respecting the mode of procedure which should be adopted in regard to it.

It would of course be useless to attempt to enumerate the various kinds of nuisances prejudicial to health, which are actionable by virtue of the principles above laid down. Upon this subject *Aldred's case* (*q*) may advantageously be consulted: it illustrates the rule of the Roman law there cited *prohibetur ne quis faciat in suo quod nocere possit alieno* (*r*). Without, then, dwelling at any length upon this part of the subject, it will possibly obviate difficulty to observe that a private nuisance may be to the person or to the property (*s*) of another; it may be of a mixed kind (*t*),

(*n*) Id. 144.

(*o*) Judgm. 2 Sim. N. S. 145; 3 Bla. Com. 219; Mitf. Pl. 5th ed. p. 168.

(*p*) Judgm. 2 Sim. N. S. 145, citing *Iveson* v. *Moore*, Comb. 58, and other cases; 3 Bla. Com. 220; ante, p. 96.

(*q*) 9 Rep. 57 b.

(*r*) See *Jones* v. *Powell*, Palm. 536.

(*s*) Post, Chap. 3, sect. 1.

(*t*) See *White* v. *Cohen*, 1 Drew.

being in part productive of personal discomfort or annoyance to the plaintiff; in part causing a depreciation in the value of property occupied by him. As regards the amount of personal inconvenience, the infliction whereof by another may be deemed to justify the interference of a Court of equity, or may sustain an action at law(*u*), the true test would seem to be that suggested by *Knight Bruce*, V.C. in *Walter* v. *Selfe*(*x*), in these words—Ought the inconvenience in question to be considered in fact as more than fanciful, or as one of mere delicacy or fastidiousness(*y*); "as an inconvenience, materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain, sober, and simple notions among the English people?"

Action for negligent treatment of patient.

The action for negligent treatment of a patient, alluded to by Blackstone in the passage formerly cited(*z*), is sustainable upon this principle, that every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not, indeed, if he be a surgeon, undertake that he will perform a cure, nor does he undertake to use the *highest possible* degree of skill; but he undertakes to bring a fair, reasonable, and competent degree of skill to the treatment of his patient; and it will be for the jury, in any given case involving a charge of negligence, to say whether the injury

312; *Flight* v. *Thomas*, 10 Ad. & E. 590; *Bliss* v. *Hall*, 4 Bing. N. C. 183.

(*u*) As to the writ of injunction to restrain the repetition or continuance of a nuisance at common law, see ante, Bk. I., Chap. 5.

(*x*) 4 De G. & S. 315, adopted in *Soltau* v. *De Held*, 2 Sim. N. S. 159.

(*y*) Lex non favet delicatorum votis, 9 Rep. 58 a.

(*z*) Ante, p. 718.

complained of really was occasioned by the want of such skill in the defendant (*a*).

3. Torts affecting personal liberty are False Imprisonment and Malicious Arrest. Torts to personal liberty

To constitute the injury of *false imprisonment* (*b*), there are two requisites, the detention of the person, and the unlawfulness of such detention. I had formerly (*c*) occasion to observe, that "the confinement of the person, in any wise, is an imprisonment," which may even be evidenced by the forcibly detaining of another in the public street (*d*). False imprisonment consists in such confinement or detention without sufficient authority (*e*). As if A. is arrested on a criminal charge under a warrant against B. (*f*); or if a warrant for the apprehension of any one on such a charge directed to the constable of X., a parish in the county of Y., be delivered for execution to a county constable of Y., and be executed by him (*g*). In either of these cases, the arrest effected under the warrant will be illegal, as unau- False imprisonment.

(*a*) Per *Tindal*, C. J., *Lanphier* v. *Phipos*, 8 C. & P. 475, 479. See *Slater* v. *Baker*, 2 Wils. 359; *Pippin* v. *Sheppard*, 11 Price, 400; *Seare* v. *Prentice*, 8 East, 348; *Hancke* v. *Hooper*, 7 C. & P. 81.

As to the remedy for negligence by an attorney, &c., see post, Chap. 4.

(*b*) The statutory form of declaration in an action for assault and false imprisonment, adapted to an ordinary state of facts, charges, "that the defendant assaulted and beat the plaintiff, gave him into custody to a policeman, and caused him to be imprisoned in a police office:" Com. L. Proc. Act, 1852, Sched. B., No. 26.

(*c*) Ante, p. 614.

(*d*) As to the question—What may suffice to constitute an 'imprisonment?' see further, *Bird* v. *Jones*, 7 Q. B. 742; *Wright* v. *Wilson*, 1 Ld. Raym. 739; *Arrowsmith* v. *Le Mesurier*, 2 B. & P. N. R. 211; *Cant* v. *Parsons*, 6 Car. & P. 504; *Wood* v. *Lane*, Id. 774.

(*e*) 3 Bla. Com. 127. See *Mostyn* v. *Fabrigas*, Cowp. 161, and 1 Smith L. C. 340; *Worth* v. *Terrington*, 13 M. & W. 781, which is also worthy of notice in reference to the law of assault.

(*f*) *Hoye* v. *Bush*, 1 M. & Gr. 775.

(*g*) *Freegard* v. *Barnes*, 7 Exch. 827.

thorised by it; and the party taking out the warrant, and delivering it to the constable, will be liable in trespass at suit of the individual arrested. So, the wrongful removal of a prisoner from one part of a prison to another, and his detention in the part to which he is so removed, will lay the foundation of an action of trespass and false imprisonment, in which even the Home Secretary may be liable, if it appear that the complainant was removed under a general order issued by such Secretary for the classification of the prisoners, which he had no legal authority to make (*h*).

An arrest and imprisonment may, however, be justified in certain cases by reference to acknowledged principles of law, or as having been effected under the sanction of judicial process (*i*).

For instance, it is laid down, that a private person is justified in arresting any of the Queen's subjects if there be a breach of the peace actually continuing, or if he has reasonable ground to believe that a breach of the peace which has been committed will be renewed (*k*). It is also clear that any bystander may and ought to interfere to part those who make an affray, and to stay those who are going to join in it; further—he may arrest the affrayers and detain them until their heat be over, and then deliver them to a constable (*l*): the principle of these decisions being, that, "for the sake of the preservation of the peace,

(*h*) *Cobbett* v. *Gray*, 4 Exch. 729.

(*i*) It is said, that "there are two classes of rightful arrest; the one where the arrest is enjoined as a duty, the other where it is permitted as justifiable;" arg. *Rex* v. *Howarth*, Moo. C. C. 213. See also Hawk. Pl. C., vol. 2, 8th edit., p. 114; *Newton* v. *Boodle*, 3 C. B. 795.

(*k*) *Price* v. *Seeley*, 10 Cl. & F. 28; *Grant* v. *Moser*, 5 M. & Gr. 123; *Baynes* v. *Brewster*, 2 Q. B. 375. See *Wooding* v. *Oxley*, 9 Car. & P. 1.

(*l*) *Timothy* v. *Simpson*, 1 Cr. M. & R. 757.

any individual who sees it broken may restrain the liberty of him whom he sees breaking it, so long as his conduct shews that the public peace is likely to be endangered by his acts" (*m*).

So, if a person comes into a house, or is in it, and makes a noise and disturbs the peace of the family, although no assault has been committed the master of the house may turn him out, or call a policeman to do so (*n*). And if a man stations himself opposite to another's house, making a disturbance, exciting others to disturbance and riot, and obstructing the public way, these are facts which may well amount to such a breach of the peace as justifies an arrest (*o*).

It seems clearly established, however, that a private individual, who has seen an affray committed, is not justified in giving in charge to a constable, who has not, after the affray has entirely ceased, after the offenders have quitted the place where it was committed, and when there is no danger of its renewal (*p*). Inasmuch, moreover, as the power of a constable, at common law, to take into his custody, upon the information of a private person, under such circumstances must be correlative with that of the latter to give in charge, it follows that the constable will not be justified in taking a party designated as the offender into custody upon such information (*q*).

(*m*) Judgm. 1 Cr. M. & R. 762.

(*n*) Per Lord *Campbell*, C. J., *Shaw* v. *Chairitie*, 3 Car. & K. 21, 25; *Rose* v. *Wilson*, 8 Moore, 362; *Green* v. *Bartram*, 4 Car. & P. 308; *Reece* v. *Taylor*, 4 N. & M. 469. Per *Patteson*, J., *Wheeler* v. *Whiting*, 9 Car. & P. 262, *Clifford* v. *Brandon*, 2 Camp. 358.

(*o*) *Webster* v. *Watts*, 11 Q. B. 311, 324; *Cohen* v. *Huskisson*, 2 M. & W. 477.

(*p*) *Baynes* v. *Brewster*, 2 Q. B. 375; Judgm. *Timothy* v. *Simpson*, 1 Cr. M. & R. 761.

(*q*) Judgm. 1 Cr. M. & R. 761.

A private individual, also, being present at the time when a felony is committed, may legally and ought to arrest or aid in arresting the offender (*r*). He may even break into a private house in order to prevent the commission of a felony (*s*). Or, a felony having been committed, he may give in charge the guilty party to a policeman (*t*). Mere suspicion that a particular person has committed a misdemeanour will not, however, justify the giving him into custody without a warrant (*u*).

Again: an arrest and imprisonment may be justified on this ground, that a felony *having been committed* there was *reasonable and probable cause* to suspect and accuse the plaintiff of it, and therefore to arrest and imprison him with a view to charging him with the offence (*x*). In any such case it is laid down, that to justify depriving a person of his liberty, the party so doing must allege such a ground of suspicion as the Court can see to be reasonable (*y*). It would not, however, be correct to say that all the evidence must be set out in the plea; it is enough to shew facts sufficient to ground a suspicion of the guilt of the party charged in the mind of a reasonable man (*z*). It will then be for the jury to say whether the facts pleaded are proved, and for the Judge to determine whether or not they amount

(*r*) Chit. Gen. Prac., vol. i., p. 418. In Burn's J. P., 29th ed., tit. "Arrest," the cases are enumerated in which a private person, a constable, or a justice of the peace, may legally arrest. See also Steer Parish L., 2nd ed., pp. 363 et seq.

(*s*) *Handcock* v. *Baker*, 2 B. & P. 260.

(*t*) *Atkinson* v. *Warne*, 1 Cr. M. & R. 827. See *Perkins* v. *Vaughan*, 4 M. & Gr. 988.

(*u*) *Fox* v. *Gaunt*, 3 B. & Ad. 798, 800.

(*x*) *Ledwith* v. *Catchpole*, Cald. 291. See *Guppy* v. *Brittlebank*, 5 Price, 525; *Allen* v. *Wright*, 8 Car. & P. 522; *Williams* v. *Crosswell*, 2 Car. & K. 422; and cases, infra.

(*y*) *Broughton* v. *Jackson*, 21 L. J. Q. B. 265.

(*z*) Id. *Mure* v. *Kaye*, 4 Taunt. 34.

to reasonable and probable cause—not for suspecting, but—for imprisoning the plaintiff (*a*).

A plea justifying the breaking and entering a house and arresting the plaintiff without warrant on suspicion of felony, ought distinctly to shew not only that there was reason to believe that the suspected person was there, but also that the defendant entered for the purpose of apprehending him (*b*).

Although, however, it is clear that a private individual cannot arrest upon bare suspicion, a constable may do so (*c*). There is this distinction between the two parties just named: in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorised to detain the party suspected until inquiry can be made by the proper authorities (*c*).

Not only under circumstances such as have been above set forth may a private person justify in an action for false imprisonment, but he may sometimes do so by virtue of particular statutes, as, for instance, under the 14 & 15 Vict. c. 19 (intituled "An Act for the better Prevention of Of-

(*a*) *West* v. *Baxendale*, 9 C. B. 141, 152.

"If treason or felony be done, and one hath just cause of suspicion, this is a good cause and warrant in law for him to arrest any man, but he must shew in certainty the cause of his suspicion; and whether the suspicion be just or lawful shall be determined by the justices in an action of false imprisonment brought by the party grieved, or upon a habeas corpus, &c." 2 Inst. 52.

(*b*) *Smith* v. *Shirley*, 3 C. B. 142.

(*c*) *Beckwith* v. *Philby*, 6 B. & Cr. 638-9; *Hobbs* v. *Branscomb*, 3 Camp. 420; *Handcock* v. *Baker*, 2 B. & P. 260; *Hall* v. *Booth*, 3 N. & M. 316; *Mathews* v. *Biddulph*, 4 Scott, N. R. 54; *Davis* v. *Russell*, 5 Bing. 354, 363; *Samuel* v. *Payne*, Dougl. 359.

fences") whereof section 10 enacts, that "it shall be lawful for any person whatsoever to apprehend any person who shall be found committing any offence against the provisions of this Act, and to convey him or deliver him to some constable or other peace officer, in order to his being conveyed as soon as conveniently may be before a justice of the peace, to be dealt with according to law." And sect. 11 further provides, that it shall be lawful for any person whatsoever to apprehend any person who shall be found committing any indictable offence *in the night*, and to give him in charge to a constable in order to his being taken before a magistrate (*d*).

So, under the Malicious Trespass Act, (7 & 8 Geo. 4, c. 30, s. 28,) it is enacted, "that any person found committing any offence against this Act, whether the same be punishable upon indictment or upon summary conviction, may be immediately apprehended *without a warrant* by any peace officer or the owner of the property injured or his servant or any person authorised by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law" (*e*).

One practical remark is, in connection with this part of the subject, deserving of attention. Inasmuch as a private individual who directs a police officer to take a person into custody may by so doing render himself liable to an action for false imprisonment (*f*), and as, in such an action,

(*d*) See Mr. Greaves's remarks upon the above section in his edition of Lord *Campbell's* Acts, p. 46; *Rex* v. *Hunt*, Moo. C. C. 93.

(*e*) See also the stat. 7 & 8 Geo. 4, c. 29, ss. 35, 63, (under which *Hughes* v. *Buckland*, ante, p. 115. was decided); *Rex* v. *Howarth*, Moo. C. C. 207; *Thomas* v. *Russell*, 9 Exch. 764.

(*f*) *Hopkins* v. *Crowe*, 7 Car. & P. 373. See *Gosden* v. *Elphick*, 4 Exch. 445, 447; *Stammers* v. *Yearsley*, 10 Bing. 35.

if the verdict be adverse to the defendant, heavy damages are usually given (*g*), it is safer in any doubtful case for a private person, especially when time will allow, rather than thus acting for himself, to apply to a magistrate for a warrant; because, whenever an arrest takes place under such instrument, the party arrested cannot sue in trespass the party who makes the charge, nor can he sustain an action on the case against him, although it should turn out that no offence whatever had been committed, unless he can prove that the party who obtained the warrant acted *maliciously* and without probable cause (*h*).

An inquiry will presently be instituted in regard to the true meaning and significance of the words "*malice*" and "*malicious*" in connection more particularly with torts.

Constable—liability of—in action for false imprisonment.

The irresponsibility of a constable or police officer in respect of an act done by him officially affecting the liberty of the subject is, as might be supposed, greater than that accorded to a private individual. "A constable," says Blackstone (*i*), "hath great, original, and inherent power with regard to arrests. He may, without warrant, arrest any one for a breach of the peace committed *in his view*, and carry him before a justice of the peace. And in case of felony actually committed, or a dangerous wounding whereby felony is likely to ensue, he may upon probable suspicion arrest the felon, and for that purpose is authorised (as upon a justice's warrant) to break open doors and even to kill the felon if he cannot otherwise be taken."

(*g*) Per *Parke*, B., *Warwick* v. *Foulkes*, 12 M. & W. 509, where that learned Judge observes, that "if people choose to settle private disputes by giving others into custody, they must take the consequences."

(*h*) Chit. Gen. Pr. vol. i. p. 620; *Stonehouse* v. *Elliott*, 6 T. R. 315.

(*i*) 4 Com. p. 292; *Levy* v. *Edwards*, 1 Car. & P. 40.

Where a particular statute—ex. gr. the Metropolitan Police Act (2 & 3 Vict. c. 47, ss. 54, 63)—authorises a constable to take into custody without a warrant any one offending against its provisions *within view of* such constable, it will be requisite for the officer's justification to shew that he has acted in strict conformity with the language of the Act (*k*). Neither at common law, nor under The City of London Police Act (2 & 3 Vict. c. xciv.) has a city police constable power to take a person into custody without warrant, merely on suspicion that he has committed a misdemeanour (*l*).

The warrant of a Court of competent authority will in very many cases protect the ministerial officer employed in executing its process, when sued in an action for false imprisonment. Upon this subject the well-established and leading rule for our guidance is, that where a Court has jurisdiction of the cause before it, and in disposing of it proceeds *inverso ordine* or erroneously, then the party who sues (*m*), or the officer or minister of the Court who executes its precept or process, will not be liable to an action (*n*). Where, however, the Court has not jurisdiction of the cause before it, then the whole proceeding is *coram non judice*, and the parties above specified may be

(*k*) *Simmons* v. *Millingen*, 2 C. B. 524; *Justice* v. *Gosling*, 12 C. B. 39.

(*l*) *Bowditch* v. *Balchin*, 5 Exch. 378.

(*m*) *A fortiori*, will a plaintiff acting under a regular warrant of a competent Court, be protected thereby: see, as a useful illustration of this remark, *Davies* v. *Fletcher*, 2 E. & B. 271.

(*n*) *The Marshalsea case*, 10 Rep. 68 b, 76 a. See *Levy* v. *Moylan*, 10 C. B. 189; *Thomas* v. *Hudson*, 14 M. & W. 353, 377; *S. C.* 16 Id. 885; *Andrews* v. *Marris*, 1 Q. B. 3, with which compare *Dews* v. *Riley*, 11 C. B. 434; *Baylis* v. *Strickland*, 1 M. & Gr. 591; *Cobbett* v. *Hudson*, 13 Q. B. 497; *Prentice* v. *Harrison*, 4 Q. B. 852, cited and explained per *Alderson*, B., *Brown* v. *Jones*, 15 M. & W. 192; *Herring* v. *Hudson*, 3 Exch. 107.

Entick v. *Carrington*, 19 Howell

liable to an action for false imprisonment under the process of the Court (*o*), for these parties are to be presumed to know the law, and therefore to be cognisant of the want of jurisdiction aforesaid. Protection is, however, by stat. 24 Geo. 2, c. 44, ss. 6, 8, extended to constables acting under magisterial warrants issued without jurisdiction, and in some other cases (*p*).

As exemplifying the former of the two rules just stated, the case of *Howard* v. *Gosset* (*q*) (in which the prior authorities, having reference to justification under warrants, are collected) may be consulted. It was there held, by the Court of Exchequer Chamber reversing the judgment of the Queen's Bench, that the warrant of the Speaker of the House of Commons, having issued in a matter over which the House had jurisdiction, was to be construed on the same principle as a mandate or writ issuing out of a superior Court acting according to the course of common law, and that it afforded a valid defence to an action for assault and false imprisonment brought against the Serjeant-at-arms who acted in obedience to such warrant.

As exemplifying the latter of the two propositions above stated may be consulted *Watson* v. *Bodell* (*r*), where it was held, that the messenger of a district Court of Bankruptcy, acting under an order which the Commissioner of that Court had no jurisdiction to make, was liable in trespass.

St. Tr. 1030; *S. C.* 2 Wils. 275; is the leading case in regard to the power to arrest and seize papers under a warrant issued by a secretary of state. See also, as to general warrants, *Leach* v. *Money*, 19 Howell St. Tr. 1002; *S. C.* 3 Burr. 1692, 1743; *Rex* v. *Wilkes*, 2 Wils. 151.

(*o*) *The Marshalsea case*, supra, Judgm. *Morrell* v. *Martin*, 3 M. & Gr. 593; *Carratt* v. *Morley*, 1 Q. B. 18; *Tinniswood* v. *Pattison*, 3 C. B. 243.

(*p*) See Broom's Pr. pp. 607—611.

(*q*) 10 Q. B 359, 411.

(*r*) 14 M. & W. 57; *Van Sandau* v. *Turner*, 6 Q. B. 773; *Ex parte Van Sandau*, 1 Phill. 445, 605.

From *The Marshalsea Case* we learn also (*s*), that a party, who merely originates a suit by stating his case to a Court of justice is not guilty of trespass and false imprisonment, though the proceedings leading to the arrest of the complainant should be erroneous or without jurisdiction (*t*). And a like remark applies where an individual prefers a complaint to a magistrate and procures a warrant to be granted upon which the accused is taken into custody, the magistrate having in fact no jurisdiction (*u*). An attorney, however, who deliberately directs the execution of a bad warrant, may by so doing render himself responsible in trespass (*v*). It is true, remark the Court of Common Pleas (*w*), that if he does no more than set a Court of competent jurisdiction in motion on behalf of his client he is no trespasser, notwithstanding that such Court should on his motion do an act of trespass by its officers, and that he would, therefore, if sued in trespass under the circumstances supposed, be entitled to a verdict on the plea of not guilty. But where by a special plea he admits and undertakes to justify his concurrence in the act complained of, he can only make out his justification by shewing a *legal* authority under which he acted (*w*).

The above remarks indicate the degree of liability in *trespass* which attaches to the plaintiff in an action, or to his attorney, for the imprisonment of the adverse party under judicial process erroneous in some wise, or defective

(*s*) Ante, p. 730.

(*t*) *Carratt* v. *Morley*, 1 Q. B. 18, 28, with which compare *Coomer* v. *Latham*, 16 M. & W. 713; *Walley* v. *M'Connell*, 13 Q. B. 903. See also *Ewart* v. *Jones*, 14 M. & W. 774; *Jarmain* v. *Hooper*, 6 M. & Gr. 827; *Abley* v. *Dale*, 11 C. B. 378; *Yearsley* v. *Heane*, 14 M. & W. 322.

(*u*) *Brown* v. *Chapman*, 6 C. B. 365, 376. See *Lock* v. *Ashton*, 12 Q. B. 871.

(*v*) *Green* v. *Elgie*, 5 Q. B. 99

(*w*) *Kinning* v. *Buchanan*, 8 C. B. 271, 291; *Bryant* v. *Clutton*, 1 M. & W. 408.

through lack of jurisdiction. Where malice is charged as an ingredient in the alleged tort, the form of the action will be *case* for a malicious arrest, or for a malicious prosecution; to each of which in due order I propose hereafter to advert.

Justice of the peace—liability of—in action for false imprisonment.

Touching the liability of a justice of the peace in an action for false imprisonment some brief remarks merely can here be offered. Justices of the peace, says Sir *M. Hale* (*x*), have a double power in relation to the arrest of felons; original, or upon complaint of another person. "If," observes the same eminent lawyer (*y*), "a justice of the peace see a felony or other breach of the peace committed in his presence, he may in his own person apprehend the felon. And so he may by word command any person to apprehend him, and such command is a good warrant without writing; but if the felony or other breach of the peace be done in his absence, then he must issue his warrant in writing under his seal to apprehend the malefactor."

Conformably to the principle stated at a former page of this work (*z*), in connection with the civil liability of judicial officers, it may be laid down, that where a justice of the peace acts *judicially* upon the complaint of another person, he will clearly not be liable for a mere error of judgment (*a*); and by a recent statute (*b*) he is expressly

(*x*) Pl. Cr., vol. 2, p. 86.

(*y*) Id. ibid. See also Burn's J. P., 29th edit., vol. 1, p. 272; *Brookshaw* v. *Hopkins*, Lofft, 240; *S. C.* Id. 235.

(*z*) Ante, pp. 103—106.

(*a*) *Linford* v. *Fitzroy*, 13 Q. B. 240; Judgm. *Garnett* v. *Ferrand*, 6 B. & C. 625-6; *Penney* v. *Slade*, 7 Scott, 285, *Kendillon* v. *Maltby*, Car. & M. 402.

(*b*) 11 & 12 Vict. c. 44, s. 1, as to which see *Barton* v. *Bricknell*, 13 Q. B. 393. The 4th section of this Act further enacts, "that *in all cases* where a *discretionary power* shall be given to a justice of the peace by any Act or Acts of Parliament, no action shall be brought

protected from liability in respect of "any act done by him in the execution of his duty as such justice," unless where proof is given that the act in question "was done *maliciously and without reasonable and probable cause*" (c).

Again—where the justice has acted in a matter *within his jurisdiction*, it is clear that a subsisting conviction good upon the face of it will be a sufficient protection to him when sued under sect. 1 of the Act above adverted to; for, according to a well-known rule, such conviction, so long as it remains in force, is conclusive evidence of the facts stated in it; and this evidence cannot be impugned or rebutted by proof of corrupt motives or of malice (d). "It is," says Lord *Tenterden*, C. J. (e) "a general rule and principle of law, that, where justices of the peace have an authority given to them by an Act of Parliament, and they appear to have acted within the jurisdiction so given, and to have done all that they are required by the Act to do in order to originate their jurisdiction, a conviction drawn up in due form, and remaining in force, is a protection in any action brought against them for the act so done."

As regards the liability of a justice of the peace in another important class of cases, viz. where he acts without jurisdiction or exceeds it, we must resort for information to

against such justice for or by reason of the manner in which he shall have exercised his discretion in the execution of any such power." See *Rex* v. *Young*, 1 Burr. 556, *Bassett* v. *Godschall*, 3 Wils. 121.

(c) As to evidence of want of "reasonable and probable cause," see *Burley* v. *Bethune*, 5 Taunt. 580.

(d) See per *Dallas*, C. J., *Brittain* v. *Kinnaird*, 1 B. & B 437; *Kirby* v. *Simpson*, 10 Exch. 358, 365; *Fawcett* v. *Fowlis*, 7 B. & C. 394; *Basten* v. *Carew*, 3 B. & C. 649; *Baylis* v. *Strickland*, 1 Scott N. R. 540; *Ashcroft* v. *Bourne*, 3 B. & Ad. 684; *Strickland* v. *Ward*, 7 T. R. 653 (a), *Aldridge* v. *Haines*, 2 B. & Ad. 395. See the cases collected, 3 Burn's J. P., 29th edit., p. 1027.

(e) 3 B. & C. 652–3. See *Lindsay* v *Leigh*, 11 Q. B. 455.

the 2nd section of the 11 & 12 Vict. c. 44, which enacts, that "for any act done by a justice of the peace in a matter of which by law he *has not jurisdiction*, or in which he shall have *exceeded his jurisdiction*, any person injured thereby, or by any act done under any conviction or order made or warrant issued by such justice in any such matter, may maintain an action against such justice in the same form and in the same case as he might have done before the passing of this Act(*f*), *without making any allegation* in his declaration, *that the act complained of was done maliciously or without reasonable or probable cause:* provided nevertheless, that *no such action shall be brought* for anything done under such conviction or order, *until after such conviction shall have been quashed*, either upon appeal or upon application to her Majesty's Court of Queen's Bench." The section before us further goes on to provide, that no such action shall "be brought for anything done under any such warrant, which shall have been issued by such justice to procure the appearance of such party, and which shall have been followed by a conviction or order in the same matter, until after such conviction or order shall have been so quashed as aforesaid; or if such last-mentioned warrant shall not have been followed by any such conviction or order, or if it be a warrant upon an information for an alleged indictable offence, nevertheless if a summons were issued previously to such warrant, and such summons were served upon such person, either personally or by leaving the same for him with some person at his last or most usual place of abode, and he did not appear according to the exigency of such summons, in such case no

(*f*) See *Leary* v *Patrick*, 15 Q B 266, 272; *Crepps* v *Durden*, Cowp 640.

such action shall be maintained against such justice for anything done under such warrant"(*g*).

The effect of the foregoing section may be shortly stated to be, that no action shall be brought for anything done under a conviction or order, where the magistrate has no jurisdiction or has exceeded it, until such conviction or order shall have been quashed; nor for anything done under a warrant to compel an appearance, followed by a conviction or order, until the same shall have been quashed; nor for anything done under such warrant, not followed by a conviction or order, or under a warrant for an alleged indictable offence, if a summons had been previously served and not obeyed.

The main distinction to be noted in regard to the form of the remedy available against a magistrate who acts without jurisdiction and that available against a magistrate who acts erroneously within his jurisdiction is thus pointed out by Mr. Justice *Erle*(*h*): "If the act of the magistrate is done *without jurisdiction* it is a trespass; if *within the jurisdiction*, the action rests upon the corruptness of motive, and to establish this the act must be shewn to be malicious."

Besides the above provisions for the protection of justices contained in the recent statute, others scarcely less important, but of too technical a character to allow of their being here examined, are included in it,—of these may be specified sect. 8, which prescribes the period of limitation in an action against a justice of the peace for anything done

(*g*) As to the latter part of the above section, see *Bessell* v. *Wilson*, 1 E. & B. 489.

(*h*) *Taylor* v. *Nesfield*, 3 E. & B. 724. See also as to the proper form of action against a justice of the peace, *Newbould* v. *Coltman*, 6 Exch. 189; *Haylock* v. *Sparke*, 1 E. & B. 471.

by him *in the execution of his office;* and sect. 9, which requires a month's notice of the intended action to be given to the justice (*k*).

It will readily be inferred from what I have said in the preceding pages, that, in actions for false imprisonment, nice and difficult questions in regard to the jurisdiction of Courts —the validity of their judgments and convictions—the legality of process—the powers properly exercisable by those who enforce it—frequently arise; touching such matters information must be sought from works specifically devoted to their investigation. With reference to the action before us, I shall here therefore offer but one additional remark, that where two or more persons have so conducted themselves as to be liable to be jointly sued for trespass and false imprisonment, the damages must be assessed against all jointly (*l*), each of the defendants being responsible for the injury sustained by their common act (*m*). "Where two persons," it has been said (*n*), "have a joint purpose, and thereby make themselves joint trespassers, and the one beats violently, and the other a little, the real injury is the aggregate of the injury received from both. So, if motive be taken into consideration, the motive of A. may be most aggravated, and the motive of B. most mitigated, then the damages must be regulated accordingly."

Before proceeding to consider that peculiar species of tort

(*k*) See *Kirby* v. *Simpson*, 10 Exch. 358, and cases there cited; *Taylor* v. *Nesfield*, 3 E. & B. 724; ante, p. 114.

As to the damages recoverable in an action for false imprisonment against a magistrate, see *Mason* v. *Barker*, 1 Car. & K. 100—against a coroner, see *Foxall* v. *Barnett*, 2 E. & B. 928.

(*l*) *Eliot* v. *Allen*, 1 C. B. 18.

(*m*) Per *Rolfe*, B., *Clark* v. *Newsam*, 1 Exch. 140.

(*n*) Per *Alderson*, B., 1 Exch. 140. See *Gregory* v. *Cotterell*, 22 L. J., Q. B., 217.

to personal liberty, evidenced by a Malicious Arrest, it seems desirable briefly to inquire as to the meaning of the terms "malice" and "malicious," when used with reference to civil proceedings.

We have already seen (*o*), that, in some classes of cases, giving rise to actions ex delicto, the *intention* which actuated the wrongdoer is wholly beside the question, whether or not an action will, under the given circumstances, lie. In others, again, the animus, motive or intention of the party charged constitutes an essential element in—if not the very gist and substance of—the charge. Falling within this latter class are divers actions for *malicious* injuries, in connection wherewith the meaning of the epithet just used demands investigation.

"Malice,"—meaning of this word in civil proceedings.

"Malice," says Lord *Campbell*, C. J. (*p*), "in the legal acceptation of the word, is not confined to personal spite against individuals, but consists in a conscious violation of the law to the prejudice of another." Malice is of two kinds—malice in law, and malice in fact. Malice *in law* is where a wrongful act is done intentionally, without just cause or excuse (*q*). If, for instance, I give a perfect stranger a blow likely to produce death, I do it *of malice*, because I do it *intentionally*, and without just cause or excuse. And if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, the law considers it as done of malice, because it is wrongful and intentional (*r*); it equally works an injury, whether I *meant* to produce an injury or not; and if I had no legal excuse for the slander,

(*o*) Ante, p. 689.

(*p*) 9 Cl. & F. 321; Per Sir *W. Follett*, arg. *Mitchell* v. *Jenkins*, 5 B. & Ad. 590; 1 Wms. Saunds. 242 b. n. (*e*).

(*q*) Judgm. *Bromage* v. *Prosser*, 4 B. & C. 255; Arg. *Sheruin* v. *Swindall*, 12 M. & W. 787.

(*r*) Judgm. 4 B. & C. 255

why should there not be a remedy against me for the injury which it produces?(s) Such being legal "malice," it follows that some acts are in law always malicious(t), without any proof being given of personal ill-will or ill-feeling.

'Malice *in fact*' is said to be of two kinds, viz. personal malice against the individual, and that sort of general disregard of the right consideration due to all mankind which, indeed, *may* not be previously directed against any one, but is nevertheless productive of injury to the complainant(u). This seems very nearly equivalent to saying that "malice in fact" may be proved to have existed in one or other of two ways—either by direct evidence, as of expressions used, of declarations made, or of conduct generally—evincing enmity towards a particular individual; or, again, it may be shewn by proof of some act from which a jury would be held justified in *inferring* a malicious motive; and the act relied upon as evidence of malice may possibly be one not aimed at the particular individual who has suffered by it(v).

The remedy for a malicious injury is by action on the case, to support which there must be both injury, in the strict sense of the word, (that is, a wrong done), and loss resulting from that injury; the injury or wrong done must, as pointed out at a former page(x), be the act of the defendant, and the loss must be a direct and natural, not a remote and indirect, consequence of the defendant's act(y). Unless, indeed, there be a loss thus directly and proximately connected

(s) Judgm. 4 B. & C. 255.

(t) See Per *Parke*, B., 12 M. & W. 791.

(u) See Per *Pollock*, C. B., 12 M. & W. 787-8; Per Lord *Ellenborough*, C. J., *Townsend* v *Wathen*, 9 East, 280-1.

(v) In the sense here assigned to it, malice *in fact* would seem to be scarcely distinguishable from malice *in law*.

(x) Ante, Bk. 1, Chap. 4, Sect. 1, § 1.

(y) Ante, pp. 93—96.

with the act, the mere *intention*, or even the *endeavour*, to produce it will not found an action(*z*). A man's *motives* will not make wrongful an act which in itself is not wrongful(*a*). An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent(*b*).

Hence, although, in many cases, the existence of a malicious intention is an essential ingredient in order to constitute the wrongfulness or injurious nature of an act, yet it will supply neither the want of the act itself, nor of its hurtful consequences; however complete the *injuria*, and whether with malice or without, if the act be, after all, *sine damno*, no action on the case will lie(*c*); the distinction between civil and criminal proceedings in this respect being very noticeable. For instance, if a contract has been made between A and B. that the latter should go supercargo for the former on a voyage to China, and C., however maliciously, persuades B. to break his contract, but in vain, it could not successfully be contended, that an action would lie against C., his malice having been ineffectual, and no loss having resulted from it to A.(*d*). Keeping these elementary principles in mind, let us proceed to inquire as to the action for a Malicious Arrest—for a Malicious Prosecution—for Defamation.

Action for malicious arrest.

To put in force the process of the law maliciously, and without any reasonable or probable cause, is wrongful; and if thereby another is prejudiced in property or person, there is that conjunction of injury and loss which will lay the

(*z*) Per *Coleridge*, J., 2 E. & B. 246-7.

(*a*) Per *Jervis*, C. J., *Heald* v. *Carey*, 11 C. B. 993.

(*b*) Per *Parke*, B., *Stevenson* v. *Newnham*, 22 L. J., C. P., 110; *S. C.* 13 C. B. 285.

(*c*) Ante, pp. 676, 685.

(*d*) Per *Coleridge*, J., 2 E. & B. 247.

foundation of an action on the case (*e*). A malicious arrest may be on mesne or on final process; but, in order to maintain an action for this wrongful act (*f*), the plaintiff must shew absence of probable cause or reason for the arrest—malice in instituting the former action (*g*)—the fact of the arrest by the defendant (*h*), and that the former suit or proceeding has been determined in the plaintiff's favour; for till then it cannot appear whether the proceeding in question was groundless or not (*i*).

Arrest on mesne process.

The ground on which an action for a malicious arrest, made in pursuance of the stat. 1 & 2 Vict. c. 110, rests, is, that the party obtaining the capias has imposed on the Judge, who allowed it to issue, by some false statement—some *suggestio falsi* or *suppressio veri*—and has thereby satisfied him not only of the existence of a debt to the requisite amount, but also that there is reasonable ground for supposing that the debtor is about to quit the country. In an action for a malicious arrest under this statute, it is essential that the plaintiff should allege falsehood or fraud

(*e*) Per Lord *Campbell*, C. J., *Churchill* v. *Siggers*, 3 E. & B. 937. See *De Medina* v. *Grove*, 10 Q. B. 152, 172; *Leyland* v. *Tancred*, 16 Q. B. 669; *S. C.* Id. 664.

(*f*) As to which see generally Chit. Jr. Pl., 2nd edit., p. 581; Selw. N. P., 10th edit., vol. 2, pp. 1058-9; Rosc. Evid., 8th edit., p. 448.

(*g*) As to what is evidence of malice in this action, see *Whalley* v. *Pepper*, 7 Car. & P. 506; *Crozer* v. *Pilling*, 4 B. & C. 26; *Nicholson* v. *Coghill*, 4 B. & C. 21; *Sinclair* v. *Eldred*, 4 Taunt 7; *Austin* v. *Debnam*, 3 B. & Cr. 139, *Tebbutt* v. *Holt*, 1 Car. & K. 280, 289.

(*h*) An action may also lie for maliciously prolonging the detention of a prisoner who has become entitled to his discharge: *Moore* v. *Guardner*, 16 M. & W. 595; *Magnay* v. *Burt* (in error), 5 Q. B. 381; *Whalley* v. *Pepper*, 7 Car. & P. 506; *Hounsfield* v. *Drury*, 11 Ad. & E. 98; *Scheibel* v. *Fairbain*, 1 B. & P. 388; *Lewis* v. *Morris*, 4 Tyr. 907.

(*i*) See *Watkins* v. *Lee*. 5 M. & W. 270; *Wilkinson* v. *Howell*, Moo. & M. 495; *Heywood* v. *Collinge*, 9 Ad. & E. 268; Per Lord *Tenterden*, C. J., *Webb* v. *Hill*, Moo. & M. 253; *Fisher* v *Bristow*, 1 Dougl. 215; *Pierce* v. *Street*, 3 B. & Ad 397.

in obtaining the original order (*k*), should shew that the defendant has in some way misrepresented the facts, or imposed upon the Judge in his representation of them (*l*). There is no doubt, indeed, that, if a person *truly* states certain facts to a Judge, and the Judge thereupon does an act which is erroneous, and which the law will not justify, the party who made the statement is not liable, because in that case the grievance complained of arises not from the false statement of the party, but from a mistake of the Judge; but this is not so where the statement which put the Court in motion is maliciously false (*m*). As arrest on mesne process is now comparatively rare, so the action for a malicious arrest on mesne process is at the present day of much less frequent occurrence than formerly.

Arrest on final process.

Process of execution on a judgment seeking to obtain satisfaction for the sum recovered is of course primâ facie lawful; and the judgment creditor cannot even be rendered liable to an action, the debtor merely alleging and proving that the judgment had been partly satisfied, and that execution was sued out for a larger sum than remained due upon the judgment. Without malice and the want of reasonable or probable cause, the only remedy for a judgment debtor thus aggrieved is to apply to the Court or a Judge that he may be discharged and that satisfaction may be entered up on payment of the balance justly due under the judgment. Where, however, the person of the debtor or his goods have been taken in execution for a larger sum than remained due on the judgment—this having been

(*k*) Judgm. *Daniels* v. *Fielding*, 16 M. & W. 206--7, followed in *Bryant* v. *Bebbett*, (Exch.), 11 Jur. 1021; *Ross* v. *Norman*, 5 Exch. 359; *Roret* v. *Lewis*, 5 D. & L. 371.

(*l*) *Gibbons* v. *Alison*, 3 C. B. 181.

(*m*) Per Lord *Campbell*, C. J., *Farlie* v. *Danks*, 4 E. & B. 499.

done by the creditor *maliciously and without reasonable or probable cause—i. e.* the creditor well knowing that the sum for which execution has been sued out is excessive, and his motive being to oppress and injure the debtor—an action on the case will lie for this malicious injury (*n*); for here are present *damnum et injuria*, giving a claim to redress and compensation.

No action, however, lies against a sheriff or his officer for arresting one who is privileged from arrest, on the ground that he is attending as a witness under summons from the Court of Bankruptcy, even though the arrest was made maliciously (*o*).

Torts to the Reputation. Action for malicious prosecution.

In treating of Torts to the Reputation, the action for a Malicious Prosecution may first conveniently be noticed. This action, though analogous to the action for a malicious arrest, differs altogether from that for false imprisonment (*p*).

The essential ground of the action for a malicious prosecution is, that a legal prosecution was carried on *without a probable cause*, whence damage has ensued to the plaintiff (*q*). This allegation of the want of probable cause, as

(*n*) *Churchill* v. *Siggers*, 3 E. & B. 929, 937.

(*o*) *Magnay* v. *Burt* (in error), 5 Q. B. 381; *S. C.*, 1 Dav. & M. 652.

(*p*) There is no similitude or analogy between an action of trespass or false imprisonment and an action for a malicious prosecution. the former lies for the defendant's having done that which upon the stating of it is manifestly illegal; the latter kind of action is for a prosecution which, upon the stating of it, is manifestly legal: *Johnstone* v. *Sutton*, 1 T. R. 544.

See, also, in further support of the text, Per *Parke*, B., *Guest* v. *Warren*, 23 L. J., Exch., 121; *S. C.* 9 Exch. 379, *Jones* v. *Currey*, 20 L. J., Q. B., 438.

As to who may be liable in this action, see *Clements* v. *Ohrly*, 2 Car. & K. 686; *Osterman* v. *Bateman*, Id. 728.

Quære, whether an action for a malicious prosecution will lie against a corporation aggregate? *Stevens* v. *The Midland Counties R. C.* 10 Exch. 352.

(*q*) Selw. N. P., 10th edit., vol. 2, p. 1057.

remarked in *Johnstone* v. *Sutton* (r), "must be substantively and expressly proved, and cannot be implied. From the want of probable cause, malice may be, and most commonly is implied; the knowledge of the defendant is also implied. From the most express malice, the want of probable cause cannot be implied. A man from a malicious motive may take up a prosecution for real guilt, or he may from circumstances which he really believes proceed upon apparent guilt; and in neither case is he liable to this kind of action" (s). "It is true," says *Tindal*, C. J. (t), "that in order to support such an action, there must be a concurrence of malice in the defendant, and want of probable cause. Malice alone is not sufficient, because a person actuated by the plainest malice may nevertheless have a justifiable reason for prosecution. On the other hand, the substantiating the accusation is not essential to exonerate the accuser from liability to an action, for he may have had good reason to make the charge, and yet be compelled to abandon the prosecution by the death or absence of witnesses, or the difficulty of producing adequate legal proof. The law, therefore, only renders him responsible *where*

(r) 1 T. R. 544-5; *Michell* v. *Williams*. 11 M. & W. 205, 211; *Musgrove* v. *Newell*, 1 M. & W. 582; 1 Wms. Saund. 230 b.

(s) "I have always understood," says *Parke*, J., in *Mitchell* v. *Jenkins*, 5 B & Ad. 594, "since the case of *Johnstone* v. *Sutton*" (1 T. R 510), "" that no point of law was more clearly settled, than that, in every action for a malicious prosecution or arrest, the plaintiff must prove what is averred in the declaration, viz. that the prosecution or arrest was malicious, and without reasonable or probable cause; if there be reasonable or probable cause, no malice, however distinctly proved, will make the defendant liable; but, when there is no reasonable or probable cause, it is for the jury to infer malice from the facts proved." See, also, *Porter* v. *Weston*, 5 Bing. N. C. 715; *Stevens* v. *The Midland Counties R. C.*, 10 Exch. 352.

(t) *Willans* v. *Taylor*, 6 Bing. 186.

malice is combined with want of probable cause. What shall amount to such a combination of malice and want of probable cause, is so much a matter of fact in each individual case, as to render it impossible to lay down any general rule on the subject; but there ought to be enough to satisfy a reasonable man, that the accuser had no ground for proceeding, but his desire to injure the accused." Moreover, in connection with the action for a malicious prosecution or arrest, the term "malice" is to be understood in a sense already assigned to it at p. 738, as signifying not necessarily spite or hatred towards an individual but malus animus, and denoting that the defendant was actuated by improper and indirect motives (*u*).

In an action for a malicious prosecution, it is a question for the jury, whether the facts brought forward in evidence be true or not,—but the question, what is reasonable or probable cause? is matter of law to be determined by the Judge (*x*). Hence, the reasonableness and probability of the ground for prosecution may depend, not merely upon the proof of certain facts, but upon the inquiry whether other facts which furnished an answer to the prosecution were known to the defendant at the time it was instituted (*y*). It may depend upon the inquiry, whether the facts stated to the defendant at the time, and which formed the ground of the prosecution, were believed by him or not (*z*), or upon this question, whether, from the conduct of the defendant

(*u*) Per *Parke*, J., *Mitchell* v. *Jenkins*, 5 B. & Ad. 595, 1 Wms. Saund. 230 b.

(*x*) See *Michell* v. *Williams*, 11 M. & W. 205; *Watson* v. *Whitmore*, 14 L. J., Exch., 41; *Hinton* v. *Heather*, 14 M. & W. 131, and cases infra.

(*y*) Judgm. *Panton* v. *Williams*, 2 Q. B. 194.

(*z*) See *Haddrick* v. *Heslop*, 12 Q. B. 267; *Turner* v. *Ambler*, 10 Id. 252; *Hinton* v. *Heather*, 14 M. & W. 131.

himself, the jury will infer that he was conscious he had no reasonable or probable cause. In any such case, however, the knowledge, the belief, and the conduct of the defendant are for the consideration of the jury, to whom nothing is left but the truth of the facts proved and the justness of the inferences to be drawn from them; the law being laid down by the Judge, that, according as the facts are found by the jury to be proved or not proved, and the inferences warranted or not, there was reasonable and probable ground for the prosecution, or the reverse (*a*).

Action for maliciously suing out commission of bankruptcy

Without dwelling longer upon the action for a malicious prosecution, it may be proper to observe, that suits for injuries very analogous thereto are occasionally brought, wherein also malice will be found to be an ingredient: thus in *Chapman* v. *Pickersgill* (*b*),—the action was in case for *falsely and maliciously* suing out a commission of bankruptcy against the plaintiff, which was afterwards superseded,—this action was held to be maintainable, Lord C. J. *Pratt* observing, "Here is falsehood and malice in the defendant, and great wrong and damage done to the plaintiff thereby. Now, wherever there is an injury done to a man's property by a false and malicious prosecution, it is most reasonable he should have an action to repair himself." But it is said, this action was never brought before; I wish never to hear this objection again. "This

(*a*) Judgm. *Panton* v. *Williams*, 2 Q. B. 194; *Heslop* v *Chapman*, 23 L. J., Q. B., 49; *Blachford* v. *Dod*, 2 B. & Ad. 179; *Broad* v. *Ham*, 5 Bing. N. C. 722; *Deleyal* v. *Highley*, 3 Bing. N. C. 950; *James* v. *Phelps*, 11 Ad. & E. 483.

As to the action for a malicious conspiracy to indict, see Selw. N. P. 10th edit. vol. 2, p. 1054-5—for maliciously conspiring to bring an action against the plaintiff, see *Cotterell* v. *Jones*, 11 C. B 713.

(*b*) 2 Wils. 145. See *Whitworth* v. *Hall*, 2 B. & Ad 695; *Cotton* v *James*, 1 B. & Ad. 128.

action is for a tort; torts are infinitely various, not limited or confined, for there is nothing in nature but may be an instrument of mischief." In connection with the preceding case, *Farley* v. *Danks* (c), recently decided in the Court of Queen's Bench, should be consulted. It was there shewn, that the defendant had petitioned for an adjudication of bankruptcy against the plaintiff, that he had *maliciously* made depositions which were *false in fact*, and had thus induced the commissioner to adjudicate the bankruptcy; but then it appeared that, even if the depositions had been true, the adjudication could not have been supported in law. It was contended, that the act of the Court, having been erroneous, could not be regarded as a *consequence* of the defendant's statement. But, as observed by *Crompton*, J., "there is not the less wrong in causing the act to be done, because the act would be illegal at any rate. In a popular sense *a person who puts the law in motion causes the thing to be done*," which *is* done under process of the law. To support an action under the circumstances specified, "all that is necessary is, that the defendant should falsely and maliciously cause the act; and he does that when he swears falsely, and the act would not be done without his so swearing" (d).

Libel.

Of torts to the reputation of an individual, libel and slander in the next place specially demand our attention. A *libel* may be defined to be a malicious defamation expressed in print, writing, or by signs, tending to injure the reputation of another, and exposing him to public hatred,

(c) 4 E. & B. 493.

(d) See further, in illustration of actions for injuries analogous to those above adverted to, *De Medina* v. *Grove*, 10 Q. B. 152, 172; *Craig* v. *Hassel*, 4 Q. B. 481; *Westaway* v. *Frost*, 17 L. J., Q. B., 698; *Sutherland* v. *Murray*, cited 1 T. R. 538.

contempt, or ridicule (*e*). It is not, however, the mere writing of libellous matter which is actionable, there must be a *publication* of the libel in order to entitle the party aggrieved by it to a civil remedy. The libellous matter must moreover be *falsely* and *maliciously* published. And according to the statutory precedent of a declaration for libel (*f*), the plaintiff charges "that the defendant falsely and maliciously printed and published of the plaintiff in a newspaper, called ——, the words following, that is to say ['he is a regular prover under bankruptcies'] the defendant meaning thereby that [the plaintiff had proved and was in the habit of proving fictitious debts against the estates of bankrupts, with the knowledge that such debts were fictitious]."

On examining the various ingredients in the right of action for libel in the order indicated by the above Form, the following remarks suggest themselves:—

The alleged libellous matter must be *false;* its truth may be specially pleaded in answer to the action (*g*). Further, the matter complained of must be shewn to have been *maliciously* published. This remark, however, must

(*e*) 2 Selw. N. P. 10th edit. vol. 2, p. 1038; *Digby* v. *Thompson*, 4 B. & Ad. 821; per *Bayley*, J., *M'Gregor* v. *Thwaites*, 3 B. & C. 33; *Du Bost* v. *Beresford*, 2 Camp. 511; *Anon.* 11 Mod. 99; Per *Parke*, B., *Parmiter* v. *Coupland*, 6 M. & W. 108; *Cook* v. *Ward*, 6 Bing. 409; *The Case of Libels*, 5 Rep. 125 a.

In regard to the question,—What is a libel? the following cases may also be consulted: *Hoare* v. *Silverlock*, 12 Q. B 624; *Hearne* v. *Stowell*, 12 Ad. & E. 719; *Cupel* v. *Jones*, 4 C. B. 259; *Wakley* v. *Cooke*, 4 Exch. 511; *Ingram* v. *Lawson*, 6 Bing. N. C. 212; *Wakley* v. *Healey*, 7 C. B. 591.

(*f*) See C. L. Com. 1st Rep. pp. 28-9; Com. L. Proc. Act, 1852, Sched. B., No. 33.

(*g*) Per *Holt*, C. J., *Anon.*, 11 Mod. 99; Per *Parke*, J., *Cockayne* v. *Hodgkisson*, 5 Car. & P. 548. See *Rumsey* v. *Webb*, Car. & M. 104; *Weaver* v. *Lloyd*, 2 B. & C. 678; *Chalmers* v. *Shackell*, 6 Car. & P. 475; *Biddulph* v. *Chamberlayne*, 17 Q. B. 351; *Helsham* v. *Blackwood*, 11 C. B. 111; *O'Brien* v. *Bryant*, 16 M. & W. 168; *O'Brien* v. *Clement*, Id. 159.

be understood in a somewhat qualified sense; for "where the natural tendency and import of the language used in any publication is to defame and injure another, the law will then presume that the publisher acted maliciously"(*h*). If the tendency of the publication were injurious to the plaintiff, then the law will presume that the defendant by publishing it *intended* to produce that injury which it was calculated to effect (*i*).

In an action for libel either party may indeed, with a view to the damages, give evidence to prove or disprove the existence of a malicious motive in the mind of the publisher of the defamatory matter; for the spirit and intention of the party publishing a libel are fit to be considered by a jury in estimating the injury done to the plaintiff (*j*). But in such an action, though evidence of malice may be given to increase the damages, it never is considered as essential, "nor," remarks *Bayley*, J., (*k*) "is there any instance of a verdict for a defendant on the ground of want of malice. Numberless occasions must have occurred (particularly in cases where a defendant only repeated what he had before heard, but without naming the author), upon which, if that were a tenable ground, verdicts would have been sought for and obtained; and the absence of any such instance is a proof of what has been the general and universal opinion upon the point." By a recent statute (6 & 7 Vict. c. 96, s. 2) it is, however, enacted (*l*) that in an action for a libel contained in any public newspaper, or other periodical publication, it shall be competent to the defendant to plead that such libel was inserted

(*h*) Arg. 9 B. & C. 644.

(*i*) Per *Littledale*, J., *Haire* v. *Wilson*, 9 B. & C. 645.

(*j*) *Pearson* v. *Lemaitre*, 5 M. & Gr. 719—720.

(*k*) Judgm. *Bromage* v. *Prosser*, 4 B. & C. 257.

(*l*) See *Chadwick* v. *Herapath*, 3 C. B. 885; 8 & 9 Vict. c. 75; *O'Brien* v. *Clement*, 15 M. & W. 435.

therein "without actual malice, and without gross negligence; and that, before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper, or other periodical publication, a full apology for the said libel, or, if the newspaper or periodical publication in which the said libel appeared should be ordinarily published at intervals exceeding one week, had offered to publish the said apology in any newspaper or periodical publication to be selected by the plaintiff in such action;" and by the same statute it is further provided, that, upon filing such plea as aforesaid, the defendant shall be at liberty to pay into Court a sum of money by way of amends for the injury sustained by the publication of the libel complained of (*l*).

In general, then, our law considers the publication of a statement, which is false in fact and injurious to the character of another, as malicious, unless it be *privileged*. If made under circumstances entitling it to be so considered, the occasion itself *prevents the inference* of malice which the law would draw in the case of an unauthorised communication, and affords a *qualified defence* in the absence of *actual malice* (*m*). To present this doctrine under a somewhat different form, our law will permit the inference of malice raised by the publication of libellous matter to be rebutted by proof of circumstances shewing that the statement complained of was privileged; but this defence may itself be rebutted or altogether neutralised by proof of actual express malice (*m*). "The rule," says Lord *Campbell*, C. J. (*n*), "is, that if the occasion be such as repels the

(*l*) See 15 & 16 Vict. c. 76, s. 70.

(*m*) *Toogood* v. *Spyring*, 1 Cr. M. & R. 193, and cases infra.

(*n*) *Taylor* v. *Hawkins*, 16 Q. B. 321; *Somerville* v. *Hawkins*, 10 C. B. 583; *Harris* v. *Thompson*, 13 C. B. 333. See *Kelly* v. *Partington*, 4 B. & Ad. 700; *Weatherston* v. *Hawkins*, 1 T. R. 110; *Wright* v. *Woodgate*, 2 Cr. M. & R. 573.

presumption of malice, the communication is privileged, and the plaintiff must then, if he can, give evidence of malice. If he gives no such evidence, it is the office of the Judge to say that there is no question for the jury, and to direct a nonsuit or a verdict for the defendant."

In illustration of the preceding remarks, I may observe, that a character bonâ fide given to a servant of any description is esteemed a privileged communication, because it is for the advantage of the public, and of honest servants generally, that characters should be freely given; in giving a character, accordingly, bona fides is to be presumed. Even though the statement complained of as defamatory should be untrue in fact, the master will be held justified by the occasion in making that statement, unless it can be shewn to have proceeded from a malicious mind; as, for example, if the statement were proved to have been false to the knowledge of the party making it, or if the master wantonly and capriciously volunteered to make a statement injurious to the servant (*o*).

Again, a master has clearly a right to charge his servant bonâ fide for any supposed misconduct in his service, and to give him admonition and blame; and the simple circumstance of the master exercising this right in the presence of another will not of necessity take away from him the protection of the law. Should it, however, appear in evidence that an opportunity had been sought for making such

(*o*) *Fountain* v. *Boodle*, 3 Q. B. 11, 12; Per *Williams*, J., 13 C. B. 352; Per *Wightman*, J., *Gardner* v. *Slade*, 13 Q. B. 801; *Rogers* v. *Clifton*, 3 B. & P. 587; *Child* v. *Affleck*, 9 B. & C. 403, 406 (citing, Per Lord *Mansfield*, C. J., *Edmonson* v. *Stevenson*, Bull. N. P. 8); Per Lord *Ellenborough*, C. J., 1 B. & Ald. 239—240.

When the master volunteers to give the character, stronger evidence will be needed to shew that he acted bonâ fide than in the case where he has given the character after being required so to do: Per *Littledale*, J., *Pattison* v. *Jones*, 8 B. & C. 586; *Coxhead* v. *Richards*, 2 C. B. 597, 601, 610; *Bennett* v. *Deacon*, 2 C. B. 628.

charge before third persons when it might have been made in private, this fact alone would be strong in proof of a malicious intention, and would deprive the master, if sued for defamation by his servant, of that immunity which the law allows to a statement such as supposed when made with honesty of purpose (*p*).

The existence of malice, indeed, may be satisfactorily established in a vast variety of ways. Thus, proof of a long practice of libelling the plaintiff would be evidence to shew that the defendant was actuated by malice in the particular publication complained of, and that it did not take place through carelessness or inadvertence; and the more nearly the evidence approaches to proof of a systematic practice of libelling, the more convincing will it be. The circumstance, that the other libels are more or less frequent—more or less remote from the date of the publication of that in question —will affect merely the weight, not the admissibility, of the evidence (*q*).

In cases such as have latterly been specified, malice might properly be inferred by a jury to have actuated the party publishing the alleged libel. Where, however, the circumstances under which a particular communication is made are consistent with either the presence or the absence of malice, it will be incumbent on the plaintiff to prove malice, in order that he may successfully sue for libel; and where the circumstances do not present any justifiable occasion

(*p*) *Somerville* v. *Hawkins*, 10 C. B. 583; *Taylor* v. *Hawkins*, 16 Q. B. 308; *Toogood* v. *Spyring*, 1 Cr. M. & R. 181; *Padmore* v. *Lawrence*, 11 Ad. & E. 380.

(*q*) Per *Parke*, B., delivering the opinion of the judges in *Barrett* v. *Long*, 3 H. L. Cas. 414.

See also, as to proof of malice, *Brine* v. *Bazalgette*, 3 Exch. 692; *Gilpin* v. *Fowler*, 9 Exch. 615; *Simpson* v. *Robinson*, 12 Q. B. 511; *Cooke* v. *Wildes*, (Q. B.) 19 Jur. 610; *Camfield* v. *Bird*, 3 Car. & K. 56.

for writing and publishing the defamatory matter, the communication is said not to be privileged (*r*).

Communication where privileged.

The question, however, still demands our attention, under what circumstances will a communication primâ facie libellous be deemed in law to have been privileged? It will be so, when made bonâ fide by the party charged, in the performance of some public or private duty, whether legal or moral; or in the conduct of his own affairs, and with a fair and reasonable hope of protecting his own interest in a matter where it is concerned (*s*); and also in some special cases, which will hereafter separately be noticed (*t*).

The case of *Coxhead* v. *Richards* (*u*) deserves careful perusal with reference to this subject. There the facts were as under: C. the mate of a ship sent to B., the defendant, a letter charging A., the captain of the vessel, with gross misconduct whilst acting in that capacity; the defendant shewed this letter to the shipowner, who thereupon dismissed A. An action for libel having been brought by A. against B., and the jury having found that the material facts alleged in the libel were *false*, the question arose, whether, upon the plea of Not Guilty, the defendant was entitled to a verdict on the ground that the communication charging the plaintiff with misconduct was privileged. Upon this point the Court of Common Pleas was equally divided; the late Chief Justice *Tindal*, and *Erle*, J., holding, that the commu-

(*r*) Per *Maule*, J., *Wenman* v. *Ash*, 13 C. B. 846, and cases cited ante, p. 750.

(*s*) Judgm. *Toogood* v. *Spyring*, 1 Cr. M. & R. 193; Judgm. *Somerville* v. *Hawkins*, 10 C. B. 589; per *Maule*, J., 13 C. B. 846, per *Parke*, J., *Cockayne* v. *Hodgkisson*, 5 Car. & P. 548; *Hopwood* v. *Thorn*, 8 C. B. 293; *Harris* v. *Thompson*, 13 C. B. 333.

(*t*) Post, pp. 756—758.

(*u*) 2 C. B. 569.

nication referred to was privileged; *Coltman*, J., and *Cresswell*, J., holding that it was not. In this conflict of opinion, however, we may, perhaps, safely conclude—1st, that, if the defendant had had any personal interest in the subject-matter to which the letter addressed to him related, as if he had been a part owner of or an underwriter on the ship, or had had any property on board her, the communication sub judice would have fallen within the rule as to privileged publications. 2ndly, that, if the danger disclosed by the letter either to the ship or the cargo or the ship's company had been so immediate as that the disclosure made to the shipowner was necessary for the purpose of averting such danger, then, upon the ground of social duty, by which every man is bound to his neighbour, the defendant would have been not only justified in making the disclosure complained of, but would have been bound to make it (*x*).

Assuming that the propositions thus laid down are incontrovertible, a difference of opinion may well exist as regards the mode of applying them to the facts in *Coxhead* v. *Richards* of this kind—Was any duty there cast on the defendant not to keep to himself the knowledge imparted to him touching the character and conduct of the plaintiff?—was it incumbent on the defendant to disclose the information received by him to the owner of the vessel? In support of an affirmative answer to these queries, it may be said, that the evil likely to arise from protecting information bonâ fide given to prevent damage from misconduct would seem likely to be much less than that which would result from putting a stop to such information by rendering the giver of it liable in damages, unless he has

(*x*) Per *Tindal*, C. J., 2 C. B. 596.

legal proof of the truth. In support of a negative answer to the questions above proposed, it may be urged that it is a duty to refrain from slandering another; and that a violation of such duty ought not to be sanctioned in the case of voluntary communications, except under circumstances of great urgency and gravity (*y*).

Such being the principal arguments pro and con adducible where a claim of privilege is founded on the alleged existence of a duty, reference may be made to *Blackham* v. *Pugh* (*z*), as shewing under what circumstances the claim in question may be substantiated on the ground that the communication complained of was made by a person in the conduct of his own affairs, and in some matter where his interest was concerned. The facts in *Blackham* v. *Pugh* were extremely simple. The defendant had supplied goods to the plaintiff on certain credit, before the expiration whereof the plaintiff, meaning to retire from business, employed an auctioneer to sell his stock in trade, and absented himself under circumstances calculated to induce the belief that an act of bankruptcy had been committed. The defendant thereupon gave notice to the auctioneer not to pay over to the plaintiff the proceeds of the sale, he "having committed an act of bankruptcy." This communication was by the majority of the Court of Common Pleas held to have been privileged, as having been made by the defendant in the conduct of his own affairs, and in a matter which concerned his own interest (*a*).

(*y*) Per *Coltman*, J., 2 C. B. 601.

(*z*) 2 C. B. 611.

(*a*) As to the question, Under what circumstances will a communication be privileged, on the ground of duty or of interest? see further, *Gilpin* v. *Fowler*, 9 Exch. 615; *Wenman* v. *Ash*, 13 C. B. 836; *Harris* v. *Thompson*, Id. 333; *Blagg* v. *Sturt*, 10 Q. B. 899; and cases infra.

Besides cases falling within the rules above considered, disparaging communications made under other and dissimilar circumstances are, on grounds of policy or expediency, held by our law to be privileged. Thus, by stat. 3 & 4 Vict. c. 9 (*b*), proceedings civil or criminal against persons for the publication of papers printed by order of either House of Parliament are to be stayed upon delivery of a certificate such as is in the Act mentioned, properly verified by affidavit, setting forth that they were published by the order and under the authority of Parliament.

Again, every individual has a right to comment on those acts of public men which concern him as a subject of the realm, if he do not make his commentary a cloak for malice and slander. There is, indeed, a material distinction between publications relating to public and to private persons as regards the question whether they be libellous. That criticism may reasonably be applied to a public man in a public capacity which might not be applied to a private individual. But any imputation of wicked and corrupt motives is unquestionably libellous, whether applied to a public man or to a private individual (*c*). Fair and candid criticism, however severe, of a literary work is likewise privileged, provided there be not mixed up with it personal abuse of the author, or matter unconnected with his work defamatory of him (*d*).

Further, within the class of privileged communications may, as a general rule, be included the publication of a

(*b*) The proceedings which led to the passing of this statute are shortly stated in May's Law of Parl., 2nd edit., pp. 156—9.

(*c*) Per *Parke*, B., *Parmiter* v. *Coupland*, 6 M. & W. 108; *Onslow* v. *Horne*, 3 Wils. 177. See *Gathercole* v. *Miall*, 15 M. & W. 319, 328.

(*d*) *Carr* v. *Hood*, 1 Camp. 354, n.; *Tabart* v. *Tipper*, Id. 350; *Green* v. *Chapman*, 4 Bing. N. C. 92.

full, *fair*, and unvarnished account(*e*) of what passes in a Court of justice, not being ex parte or mixed up with injurious comments(*f*). To this rule there are, indeed, exceptions, ex. gr., matters may appear in a Court of justice having so immoral a tendency, or being so injurious to the character of an individual, that their publication could not be tolerated(*g*). "The only case," says *Littledale*, J.(*h*), "in which an editor of a newspaper can justify a libel on the ground that it contains an account of a trial, is where he really gives a true and accurate report of it; and even in that case it will be for the Court to consider whether it was lawful to publish it." A counsel, indeed, entrusted with the interests of others, and speaking from their information, for the sake of public convenience, is privileged in commenting fairly and bonâ fide on the circumstances of the case confided to him, and in making observations on the parties concerned and their instruments or agents in bringing it into Court(*i*). But, though such may be the duty of counsel, and though it may be incumbent on him to state facts injurious to the characters of individuals, if he speak conscientiously, according to his instructions, it

(*e*) *Stiles* v. *Nokes*, 7 East, 493; *Duncan* v. *Thwaites*, 3 B. & C. 556. See *M'Gregor* v. *Thwaites*, Id. 24.

(*f*) *Saunders* v. *Mills*, 6 Bing. 213; *Delegal* v. *Highley*, 3 Bing. N. C. 950, 960.

(*g*) *Hoare* v. *Silverlock*, 9 C. B. 20; *Flint* v. *Pike*, 4 B. & C. 473, 478—480. In *Rex* v. *Carlile*, 3 B. & Ald. 161, 171, *Best*, J., states the rule above laid down, with this qualification, that "what is contained in the publication must be neither defamatory of an individual, tending to excite disaffection, nor calculated to offend the morals of the people." See *Rex* v. *Creevey*, 1 M. & S. 273.

(*h*) *Flint* v. *Pike*, 4 B. & C. 484. See further as to the subject treated supra, Holt N. P. C. 627, n.

(*i*) *Hodgson* v. *Scarlett*, 1 B. & Ald. 232, 240; *S. C.* Holt, N. P. C. 621; and see the note, Id. 626; *Brooke* v. *Montague*, Cro. Jac. 90; *Fairman* v. *Ives*, 1 B. & Ald. 645; *Doyle* v. *O'Doherty*, Car. & M. 418.

does not follow that others will be privileged in printing and publishing what he says; for, as to them, the reason of the privilege, which is the advancement of public justice, does not apply. They may consequently be required to prove the truth of the imputations complained of (*k*), or, at all events, to shew that the publication contains a full and accurate account of the proceedings which it professes to report (*l*). In like manner, a member of either House of Parliament is privileged in *there* making reflections on individuals; but this privilege does not extend to him or to any other person in publishing the defamatory speech (*m*).

Publication of a libel must be proved in order that an action for it may be sustainable. A libel may be 'published' in various ways, ex. gr., by reading it aloud (*n*), by selling it or distributing it gratis, by sending it by post or otherwise to any third person. A paper containing libellous matter may, moreover, be published without any actual manifestation of its contents, in like manner as an individual publishes an award without reading it to the parties who have submitted to his arbitration, or a will without declaring its contents to those to whom he makes the publication. In the case of a libel, 'publication,' it has been said (*o*), is "nothing more than doing the last act for the

(*k*) Per *Bayley*, J., *Lewis* v. *Walter*, 4 B. & Ald. 613.

(*l*) *Delegal* v. *Highley*, 3 Bing. N. C. 950.

(*m*) *Rex* v. *Lord Abingdon*, 1 Esp. 226; *Rex* v. *Creevey*, 1 M. & S. 273, n.; Holt N. P. C. 628.

(*n*) Per *Abbott*, C. J., 4 B. & Ald. 160.

What is sufficient evidence of publication? *Fryer* v. *Gathercole*, 4 Exch. 262; *Cook* v. *Ward*, 6 Bing. 409.

The mode of proving the publication of any libel contained in a newspaper is specially provided for by the stat. 6 & 7 Will. 4, c. 76, ss. 6, 8. See *Duke of Brunswick* v. *Harmer*, 19 L. J., Q. B. 20.

(*o*) Per *Best*, J., *Rex* v. *Burdett*, 4 B. & Ald. 126; per *Abbott*, C. J., Id. 160. But see, per *Bayley*, J., Id. 153.

accomplishment of the mischief intended by it." The moment a man delivers a libel from his hands, and ceases to have control over it, there is an end of his locus pœnitentiæ; the injuria is complete, and the libeller may be called upon to answer for his act(*p*).

The making of a libel known, then, to any individual other than the party libelled, amounts indisputably in law to a publishing of the libel(*p*). Even the addressing to a wife a letter containing libellous matter reflecting on her husband, is a publication(*q*). And in an action for libel, it is no justification that the libellous matter was previously published by a third person, and that the defendant, at the time of his publication of it, disclosed the name of that person, and believed all the statements contained in the libel to be true(*r*).

Assuming that on the trial of an action for libel proof has been duly given of the alleged libel, and of its publication, what, it may be asked, are the respective functions of the Judge and jury in regard to the matter before them? It has long been the practice for the Judge in such cases first to give a legal definition of the tort charged against the defendant, and then to leave it to the jury to say whether the facts necessary to constitute that offence are

(*p*) Per *Holroyd*, J., 4 B. & Ald. 143, who observes, that "in 5 Rep. 126 a, it is laid down, that a scandalous libel may be published *traditione*, when the libel or any copy of it is delivered over to scandalise the party. So that the mere delivering over or parting with the libel with that intent, is deemed a 'publishing.' It is an uttering of the libel, and that I take to be the sense in which the word 'publishing' is used in law. Though, in common parlance, that word may be confined in its meaning to making the contents known to the public, yet its meaning is not so limited in law." See *Griffiths* v. *Lewis*, 7 Q. B. 61.

(*q*) *Winman* v. *Ash*, 13 C. B. 836.

(*r*) *Tidman* v. *Ainslie*, 10 Exch. 63, and cases there cited.

proved to their satisfaction. It is the Judge's duty also to determine whether or not an alleged libel is *capable* of the meaning ascribed to it by an innuendo, though where he is satisfied of that it must be left to the jury to say whether the publication in question has the meaning so ascribed to it (*s*), or was levelled at the plaintiff (*t*).

We have already seen (*u*) that a publication without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule, is a libel. Whether the particular publication which is the subject of inquiry is of that character, and would be likely to produce that effect, is a question upon which a jury is to exercise their judgment, and to pronounce their opinion as a question of fact. The Judge, as a matter of advice to them, in deciding that question, may, indeed, give his own opinion as to the nature of the publication complained of, but is not bound to do so as a matter of law (*x*).

The declaration in an action for libel must, of course, sufficiently shew upon the face of it, that a libel has been published by the defendant, otherwise the plaintiff may be

(*s*) *Sturt* v. *Blagg*, 10 Q. B. 906, 908; *S. C.* Id. 899; *Barrett* v. *Long*, 3 H. L. Cas. 395; *Babonneau* v. *Farrell*, 15 C. B. 360.

(*t*) *Merywether* v. *Turner*, 7 C. B. 251. See *Le Fanu* v. *Malcolmson*, 1 H. L. Cas. 637; *Griffiths* v. *Lewis*, 7 Q. B. 61.

(*u*) Ante, p. 747.

(*x*) Per *Parke*, B., and *Alderson*, B., *Parmiter* v. *Coupland*, 6 M. & W. 108, 109. See further as to the functions of Judge and jury in actions of libel, *Fisher* v. *Clement*, 10 B. & C. 472; *Empson* v. *Fairford*, W. W. & D. 10; *Reeves* v. *Templar*, 2 Jur. 187; *Hughes* v. *Reeves*, 4 M. & W. 204; *Scales* v. *Cheese*, 10 M. & W. 488.

Words uttered must be construed in the sense which hearers of common and reasonable understanding would ascribe to them, even though particular individuals, better informed on the matter alluded to, might form a different judgment on the subject: *Hankinson* v. *Bilby*, 16 M. & W. 442, 445. See *Daines* v. *Hartley*, 3 Exch. 200.

nonsuited, or the judgment will, after verdict, be arrested (*y*). A miscarriage, however, in framing the declaration for libel (*z*) is much less to be apprehended now than it formerly was, owing to its shape having been simplified by the Common Law Procedure Act, 1852, the 61st section whereof renders unnecessary the introduction in it of prefatory averments setting forth the precedent facts connected with the expressions complained of as defamatory, and in reference to which such expressions are alleged to have been used (*a*).

The section above cited enacts, that a plaintiff suing for libel "shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense, without any prefatory averment to shew how such words or matter were used in that sense, and such averment shall be put in issue by the denial of the alleged libel or slander; and where the words or matter set forth, with or without the alleged meaning, shew a cause of action, the declaration shall be sufficient."

Slander.

The declaration in an action for slander is in this form (*b*):—It alleges "That the defendant falsely and maliciously spoke and published of the plaintiff the words following, that is to say ['he is a thief']." The special damage, if any, should then be stated with such reasonable particularity as to give notice to the defendant of the peculiar injury complained of; for instance, 'whereby the

(*y*) *Hearne* v. *Stowell*, 12 Ad. & E. 719, 731-2. See *Solomon* v. *Lawson*, Q. B. 823.

(*z*) The remark supra applies also to a declaration for slander.

(*a*) See the subject above alluded to fully explained, C. L. Com. 1st Rep. pp. 28-9.

(*b*) Com. Law Proc. Act, 1852, Sched. B., No. 32.

plaintiff lost his situation as gamekeeper, in the employ of A.'

The remarks heretofore made with respect to libel will be found generally applicable in regard to oral defamation. There is, however, this great distinction between the two actions, that from a libel damage is always implied by law, whereas some kinds of slander only are actionable without proof of special damage. In order to sustain an action for slander *without proof of special damage*, evidence must be given of some imputation on the plaintiff of a crime punishable by law, or of the having some contagious disorder which may exclude from society, or the words complained of must be shewn to have been spoken of the plaintiff with reference to his trade, office, or profession, and to have been calculated to injure him therein (*c*). What are such words, and what are not, it may often be difficult to determine (*d*). To say of a tradesman, "if he does not come and make terms with me, I will make a bankrupt of him and ruin him," must necessarily be highly prejudicial to him in his business: such words are *in their nature* defamatory, because, when used by the defendant, they necessarily imply that he has the power to carry his threat into execution (*e*).

(*c*) See per *Bayley*, J., *M'Gregor* v. *Thwaites*, 3 B. & Cr. 33; note to *J'Anson* v. *Stuart*, 2 Smith L. C. 30, 38.

(*d*) As to defamatory words falling under the 1st or 2nd of the three classes above specified, see *Heming* v. *Power*, 10 M. & W. 564; *Edsall* v. *Russell*, 4 M. & Gr. 1090; *Curtis* v. *Curtis*, 10 Bing. 447; *Slowman* v. *Dutton*, Id. 402; *Tozer* v. *Mashford*, 6 Exch. 539; *Wadsworth* v. *Bentley*, 23 L. J., Q. B. 3; *Helsham* v. *Blackwood*, 11 C. B. 111; *Bloodworth* v. *Gray*, 7 M. & Gr. 334. As to defamatory words falling within the 3rd of those classes, see *Southee* v. *Denny*, 1 Exch. 196, and cases infra.

(*e*) *Brown* v. *Smith*, 13 C. B. 596. See *Rolin* v. *Steward*, 14 C. B. 603 *Bellamy* v. *Burch*, 16 M. & W. 590 *Griffiths* v. *Lewis*, 7 Q. B. 61; *Robinson* v. *Marchant*, 7 Q. B. 918.

On the other hand, no action will lie, without averment and proof of actual damage, for verbally imputing incontinence to a clergyman, unless he is beneficed or holds some clerical office or employment of temporal profit (*f*). Though, I may add, any disparaging words spoken of another without legal justification are actionable, if productive of special damage (*g*) flowing naturally from the slander (*h*). And words, written or oral, which falsely depreciate the value of chattel property may also be made the subject of an action, provided special damage ensue from them (*i*). The distinction between a libel or slander on a person in the way of his trade, which is actionable, as we have already seen, without proof of special damage, and words injuriously reflecting on the quality of his wares and merchandize, is sometimes rather fine (*k*).

Slander of title.

There is one rather peculiar kind of slander—viz. slander of title to land or other realty—which in concluding the present chapter may conveniently be noticed. Slander of title signifies a statement of something tending to cut down the extent of title to some estate vested in the plaintiff; and this is actionable only when it is false and malicious, *i. e.* done with intent to injure the plaintiff. Suppose, for instance, that one having an infirm title to property is about to sell it, or to make it the subject of a settlement, and that another, moved by spite and malice, dis-

(*f*) *Gallwey* v. *Marshall*, 9 Exch. 294 (citing *Hopwood* v. *Thorn*, 8 C. B. 293, and other cases); see *Pemberton* v. *Colls*, 10 Q. B. 461.

(*g*) *Wilby* v. *Elston*, 8 C. B. 142; *James* v. *Brook*, 16 L. J., Q. B., 17.

(*h*) *Tunnicliffe* v. *Moss*, 3 Car. & K. 83; ante, p. 93.

(*i*) See Cooke on Defamation, p. 20. As to the action for scandalum magnatum, Id. pp. 25—27.

(*k*) *Evans* v. *Harlow*, 5 Q. B. 624, *Ingram* v. *Lawson*, 6 Bing. N. C. 212.

closes what he believes to be a defect in the title, which information afterwards turns out to be untrue; suppose, further, that injury thence results to the proposed vendor; in such case an action will lie at suit of this latter party, the statement being false and malicious, and injurious to him; but under the circumstances just supposed, both the falsehood of the statement made and express malice on the part of the defendant must be shewn, or there will be no case for the jury (*l*).

(*l*) *Pater* v. *Baker*, 3 C. B. 831; *Brook* v. *Rawl*, 4 Exch. 521. See *Rogers* v. *Macnamara*, 14 C. B. 27; and cases cited, 2 Selw. N. P. 10th edit. p. 1247; and 2 Smith. L. C., p. 38.

CHAPTER III.

OF TORTS TO PROPERTY.

HAVING in the preceding chapter treated of Torts to the Person and Reputation, I now propose to take a brief and elementary view of the ordinary civil Wrongs which may be done to Property, Real or Personal. In carrying out this plan, I shall have more particularly to examine the nature of the remedy allowed by law for the recovery of land—for enforcing compensation in damages for an injury direct or consequential done to it—for recovering chattel property tortiously withheld from its owner—for compelling pecuniary satisfaction for its forcible abstraction, or in respect of an injury caused to it. Before inquiring as to the subjects here specified, it may be well to remind the reader that the several rules and principles of law, which will now for awhile engage our attention, concern—and have been fashioned to protect —that absolute right, which, as *Blackstone* (*a*) tells us, is inherent in every Englishman—*the right of property;* consisting "in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." Whatever may be the origin of private property, the modifications to which it is subjected and the method of conserving it in the present owner or of transferring it from man to man, are entirely derived from social exigencies (*b*), and are scrupulously regulated by our law, which is extremely watchful in ascertaining and protecting the rights in question.

(*a*) 1 Com. p. 138. (*b*) Id. ibid.

From Magna Charta downwards, not merely the land and freehold of the subject, but his goods and chattels, have in innumerable instances been jealously guarded by enactment; and, although there are cases in which *pro salute populi* the rights of property are violated or infringed, such invasion of them is never, without due caution and inquiry, tolerated or sanctioned; and, even when this *is* permitted, full compensation is invariably granted to or made enforceable at suit of the individual aggrieved; the principle of our law being to give to him, either out of the public purse or from some private source, an indemnification and equivalent for the injury sustained.

Save, however, in extreme or urgent cases, such as have been just adverted to, the words of Sir *E. Coke* (*c*), in his commentary on our celebrated statute, still hold true,—that every subject, for injury done to him in *goods*, in *lands*, in *person*, by any other subject (be he ecclesiastical or temporal), "may take his remedy by the course of the law, and have justice and right for the injury done to him—freely without sale—fully without any denial—and speedily without delay."

SECT. I.—*Of Torts to Real Property.*

Ejectment.

Of ordinary injuries or torts to real property, that which may here, with propriety, first be noticed, is constituted by the wrongful detention or withholding of land (*d*) from its lawful owner, by possession and occupancy adverse to his rights. For this injury the remedy is by *ejectment*, which is the specific form of action prescribed by our law for re-

(*c*) 2 Inst. 55.

(*d*) The questions,—by whom an ejectment may be brought, and for what it will lie, are fully treated in Selw. N. P. tit. "Ejectment," ss. 2 and 3.

covering the possession of land, and lies at suit of the claimant against the wrongful occupier of it.

Ejectment is brought rather with a view to recovering the possession of land than in assertion of a title to it which shall be altogether indefeasible. If A. claims land of which B. is in possession, B. is in law to be considered as owner of the land until the contrary be proved. So that A. will necessarily have to recover possession, if at all, by the strength of his own, and not by the weakness of B.'s title (*e*). Should A. succeed in doing so, and should it happen that B. or any other person afterwards becomes clothed with a better title than A., a second action may be brought, and A. may be ejected from the land. Hence Lord *Mansfield* takes occasion (*f*) to observe, that "in truth and substance a judgment in ejectment is a recovery of the *possession* (not of the seisin, or freehold) without prejudice to the *right*, as it may afterwards appear even between the parties." He, then, who recovers in ejectment can only be possessed *according to the right which he has.* If he has a freehold interest in the land, he is in as a freeholder. If he has a chattel interest, he is in as a termor. If he has no title at all, he is in as a trespasser, and will be liable to account to the true owner for the profits of the land (*f*). There is, indeed, a cogent reason why a judgment in ejectment cannot, even as between the same parties, be deemed conclusive evidence, for a person may have a title to the possession of land at one time and not at another.

The remarks of Lord *Mansfield*, in *Taylor* v. *Horde*, with reference to the effect and legal operation of the judg-

(*e*) Per *Lee*, C. J., *Martin* v *Strachan*, 5 T. R. 110 n.

(*f*) *Taylor* d. *Atkyns* v. *Horde*, 1 Burr. 114.

ment in ejectment seem still generally applicable, inasmuch as the 207th section of the Common Law Procedure Act, 1852, expressly declares that the effect of a judgment in ejectment under that Act "shall be the same as that of a judgment in the action of ejectment heretofore used." It is observable too that, as under the improved mode of procedure in ejectment there are no *pleadings* in that action (*g*), a judgment in ejectment, even where founded upon the same title and between the same parties, cannot be *pleaded* by way of estoppel to a second action: but still it seems clear on the authorities that such a judgment would, as between the same parties, be evidence, though not conclusive, on behalf of the party who obtained a verdict on the first trial (*h*).

Ejectment then depends mainly upon title, and this is ordinarily expressed by saying that it is "the action by which a person having a right of entry into land recovers its possession" (*i*). This remark, indeed, holds true, whether the relation of landlord and tenant exists or not between the litigating parties. Where this relation does not exist, the plaintiff in ejectment must shew in himself a good and sufficient legal title to the land claimed. So that, if the occupant can answer the case set up on the part of the claimant by shewing the real title to be in another, that will suffice for his defence (*k*). Reasonable presumption, however, will be admitted in favor of a title—for instance, if the plaintiff claims as heir-at-law of A., it will be suffi-

(*g*) Com. L. Proc. Act, 1852, s. 178.

(*h*) Per Lord *Abinger*, C. B., and *Parke*, B., *Doe* d. *Strode* v. *Seaton*, 2 Cr. M. & R. 728. See *Aslin* v. *Parkin*, 2 Burr. 665; *Doe* v. *Wells man*, 2 Exch. 368; *Doe* v. *Huddart*, 2 Cr. M. & R. 316; *Doe* d. *Brayne* v. *Bather*, 12 Q. B. 941; *Litchfield* v. *Ready*, 5 Exch. 939.

(*i*) C. L. Com. 1st Rep. p. 54.

(*k*) Adams Ejectm. 4th ed. p. 28.

cient for him to prove that A. was in possession, and that the plaintiff is his heir; for it shall be intended primâ facie that A. was seised in fee until the contrary appear (*l*).

Where the relation of landlord and tenant exists between the claimant of land and the party in possession it will not be necessary for the landlord claiming the land to prove his title to it, by virtue of the well-known rule, that a tenant shall not be allowed to dispute his landlord's title, i. e. shall not be permitted to dispute the *original right* of him by whom he has himself been admitted into possession. If B., claiming under A. lets land to C. for a year and dies, and A. afterwards brings ejectment against C., C. may in some cases be estopped from disputing A's title paramount to the land (*m*). A tenant, however, may shew that his landlord's title has ceased and determined subsequently to his own entry into the land and attornment to the plaintiff. And, in a word, as between landlord and tenant the right to maintain ejectment will depend upon this question, whether the landlord or the tenant was at the particular date specified in the declaration entitled to the possession of the land for which the action was brought—a question which will usually have to be determined by reference to the terms of the demise, or to the covenants and conditions (if any) contained in the lease between the parties.

A landlord, then, suing his tenant in ejectment will in general merely be required to prove the circumstances under which the defendant or the party under whom he holds was admitted into possession, and further, to shew that his

(*l*) Woodf. L. & T., 6th edit., p. 858.

(*m*) *Barwick* v. *Thompson*, 7 T. R 488.

right to the possession has ceased (*n*). Where the party in occupation of land holds under a lease, his right to the possession may determine by mere efflux of time, or by any act on his part working a forfeiture of the lease—any act, for instance, by which he disaffirms or impugns the title of his lessor; for to affect to hold under a lease and at the same time to deny the interest or estate out of which the lease was granted, would be manifestly inconsistent and in direct violation of that elementary rule which forbids a man to "blow hot and cold" with reference to the same transaction—to insist at different times on the truth of each of two conflicting allegations, according to the promptings of his private interest (*o*).

But besides forfeiture by disaffirmance of the landlord's title, the term may become forfeited in pursuance of the express wording of the lease, that is, of some express covenant or condition inserted therein. "The general principle," says *Ashhurst*, J., in *Roe* v. *Galliers* (*p*), "is clear, that the landlord having the *jus disponendi* may annex whatever conditions he pleases to his grant, provided they be not illegal or unreasonable;" he may, therefore, provide that he shall have a right of re-entry upon the demised premises on nonpayment of rent, or on nonperformance of the covenants contained in the lease, and some such proviso is accordingly inserted in every lease, whether it be of a dwelling-house or other building, of a farm or of land generally (*q*).

(*n*) Adams on Ejectment, 4th edit., p. 232. Where indeed the privity is not between the immediate parties to the action, the claimant will also have to prove his derivative title from the party by whom the defendant was originally admitted into possession, Id., ibid.

(*o*) Leg. Max., 2nd edit., p. 127.

(*p*) 2 T. R. 137.

(*q*) See *Penniall* v. *Harborne*, 11 Q. B. 368; *Hunt* v. *Bishop*, 8 Exch. 675.

Further, a lease for years may be determined by cancellation of the instrument of demise, by surrender of the term, or by its becoming merged in the fee, or by notice to quit given in conformity with the provisions of the lease (*r*). Whilst a tenancy from year to year also may be determined by either party giving to the other of them a due notice to quit (*s*). And, lastly, in some cases a tenancy may be determined by the death of either of the contracting parties (*t*).

It will be convenient here to observe, that the Common Law Procedure Act, 1852, contains various important provisions having reference to the proceedings in ejectment by a landlord against his tenant for nonpayment of rent (s. 210), or for holding over after expiration of the term, or determination of the tenancy by notice to quit (s. 213), (*u*).

The practice in ejectment is now regulated by various sections (ss. 168—221) of the Act just cited. Under its provisions the action commences, not as formerly by service of the declaration (*x*), but by a writ—directed to the persons in possession of the premises sought to be recovered by name, and generally to "all persons entitled to defend the possession" of the property claimed,—which is, moreover, required to be described with reasonable certainty in the writ.

(*r*) As to which, see Selw. N. P., 10th edit., vol. 2, pp. 698, 701.

(*s*) Id., ibid; *Doe* d. *Dixie* v. *Davies*, 21 L. J., Exch., 60; *Tress* v. *Savage*, 4 E. & B. 36. As to the mode of determining a tenancy at will see *Doe* d. *Davies* v. *Thomas*, 6 Exch. 854, 858.

(*t*) Woodf. L. & T., 6th edit, p. 231.

(*u*) In regard to proceedings in ejectment by landlord against tenant, see also sect. 217 of the Act above specified.

(*x*) A concise statement of the mode in which an ejectment was *formerly* conducted, is given by the Common Law Commissioners at pp. 54—56 of their First Report.

The writ of ejectment (*y*) commands the parties to whom it is directed, or such of them as deny the alleged title of the claimant, within a certain period, viz. sixteen days, after service of the writ to appear in Court, to defend either for the *whole* or for *part* of the premises in question; the writ further notifies to the defendant (if there be only one), that in default of putting in an appearance judgment may be signed, and he turned out of possession. The writ in ejectment must, like an ordinary writ of summons, be indorsed with the address of the attorney issuing it, or (if it were issued by the plaintiff in person) of the plaintiff. It remains in force for *three* calendar months, and must be served "in the same manner as an ejectment has heretofore been served, or in such manner as the Court or a Judge shall order" (*z*).

In the case of what is called a '*vacant possession*,' i. e. where the premises sought to be recovered are wholly deserted and void, a peculiar mode of service of the writ of ejectment is prescribed by s. 170 of the Common Law Procedure Act, 1852, viz., "by posting a copy thereof upon the door of the dwelling-house or other conspicuous part of the property" in question. Even where there is no tenant actually upon the premises a distinction must be taken between cases, where the tenant has actually abandoned the possession, and cases where, although he has discontinued to occupy the premises, he still retains the virtual possession of them (*a*), as by leaving property upon

(*y*) See the form of this writ, C. L. Proc. Act, 1852, Sched. B., No. 13.

(*z*) As to the mode of serving a declaration in ejectment under the former practice, see 2 Selw. N. P., 10th edit., p. 718; Wise's Ed. C. L. Proc. Act, 1852, pp. 181-2.

(*a*) Woodf. L. & T., 6th edit., p. 830.

them or otherwise. In the former only of the two cases just specified must the claimant proceed as upon a vacant possession, whilst in the latter he will be required to effect service of the writ in such manner as he may be able (*b*).

In general, service of the writ in ejectment must be upon the person in possession of the premises—should he, however, hold as tenant merely for some third party, reference will have to be made to the 209th section of the Common Law Procedure Act, 1852, which directs that "every tenant to whom any writ in ejectment shall be delivered, or to whose knowledge it shall come, shall forthwith give notice thereof to his landlord, or his bailiff or receiver, under penalty of forfeiting the value of three years' improved or rack-rent of the premises demised or holden in the possession of such tenant to the person of whom he holds, to be recovered by action in any Court of common law having jurisdiction for the amount." When notice has been thus given to his landlord by the tenant in possession, the former will, under the 172nd section of the Act, by leave of the Court or a Judge, be allowed to appear and defend, on filing an affidavit, shewing that he is in possession of the land in question, either by himself or his tenant (*c*), and by section 173, he will, on entering an appearance, be required to state expressly that, "he appears as landlord," in which case he will be at liberty

(*b*) *Doe* d. *Lord Darlington* v. *Cock*, 4 B. & C. 259.

(*c*) Under the section here specified it is enough if a primâ facie case be shewn by affidavit, stating that the applicant is in possession by himself or his tenant: *Croft* v. *Lumley*, 24 L. J., Q. B., 78; *Butler* v. *Meredith* (Exch.), 19 Jur. 450.

By sect. 176 of the Act, the Court or a Judge has power "to strike out or confine appearances and defences set up by persons *not* in possession by themselves or their tenants."

to set up "any defence which a landlord appearing in an action of ejectment has heretofore been allowed to set up, and no other" (*d*).

If, after appearance entered in an action of ejectment, the claimant, without going to trial, suffer the time allowed for so doing by the practice of the Court in ordinary cases after issue joined to elapse, the defendant in ejectment may give twenty days' notice to the claimant to proceed to trial at the sittings or assizes next after the expiration of the notice, and if the claimant neglects to proceed to trial in pursuance thereof, and the time for going to trial shall not be extended by the Court or a Judge, the defendant may sign judgment and recover the costs of his defence (s. 202).

Again, assuming that the tenant in possession does not allow judgment to go against him by default, but appears to the action within the time appointed (s. 171), this peculiarity presents itself, that there are no written pleadings in ejectment, the 178th section of the recent statute (*e*) expressly providing that, "in case an appearance shall be entered, an issue may at once be made up *without any pleadings*" (*f*); particulars of the claim and defence, if any, being annexed to the record by the claimant (*g*). The trial upon the issue raised between the parties will then take place in the same manner as in other actions (s. 180); and the question to be tried and decided between the

(*d*) The nature of the defence which a landlord could, prior to the C. L. Proc. Act, 1852, set up in an action of ejectment is shortly stated in Wise's Ed. of the Act, pp. 184--5.

(*e*) See also Adams Ejectm., 4th edit., pp. 227, 231.

(*f*) But by "consent of the parties, and by leave of a Judge, a special case may be stated, according to the practice heretofore used" (s. 179).

(*g*) Sect. 180.

claimant of the land and the defendant will be "whether the statement in the writ of the title of the claimant is true or false, and, if true," and there be several claimants, "then which of the claimants is entitled, and whether to the whole or part, and if to part, then to which part of the property in question" (s. 180).

As there is no plea (save to the jurisdiction) in ejectment, it follows that an equitable defence under the Common Law Procedure Act, 1854, s. 83, is not pleadable in such action (*h*).

Without attempting to go minutely through even the more important of those sections of the first Common Law Procedure Act which regulate the practice in ejectment, I may remark, that they seem to offer every necessary facility to any one in possession of land actually or constructively to come in to defend his possession, and to contest the title to be put forward at the trial by the plaintiff. This he may do either altogether, or as regards a part *only* of the premises mentioned in the writ (s. 174), and the issue will be restricted accordingly.

If at the trial the defendant appears, and the claimant does not appear, the claimant will be nonsuited—if the claimant appears, and the defendant does not appear, the claimant will be entitled to recover without any proof of his title (s. 183). Further, if the title of the claimant shall appear to have existed as alleged in the writ, and at the time of service thereof, but it shall also appear to have expired before the time of trial, the claimant will notwithstanding be entitled to a verdict according to the fact that he was so entitled at the time of bringing the action and

(*h*) *Neave* v. *Avery*, (C. P.) 19 Jur. 575.

serving the writ, and to a judgment for his cost of suit (s. 181). If the jury find for the claimant, judgment may then be signed (s. 185), and execution may issue for recovery of possession of the property, or such part thereof as the jury shall find the claimant entitled to, and for costs of the suit (*i*). It is, moreover, important to remark, that where ejectment is brought by a landlord against his tenant after a forfeiture or otherwise, the claimant will at the trial be permitted (after it has been shewn that the defendant was served with notice of trial, and after proof by the plaintiff of his right to recover possession of the whole, or of any part of the demised premises) to go into evidence of the *mesne profits* received down to the time of the verdict, and may recover damages in respect thereof (s. 214) (*j*). In cases not arising between landlord and tenant, however, after judgment has been obtained in ejectment for the premises which formed the subject of the action, a separate action of trespass for mesne profits is necessary in order to recover damages from the occupant in respect of so much as may have been received by him during the period of his wrongful occupancy. I may add, that, from the time of *Aslin* v. *Parkin* (*k*) down to *Doe* v. *Wright* (*l*), it has always been held that a judgment by default in an action of ejectment, followed by a writ of possession, even though not pleaded, is evidence of the title and possession of the

(*i*) On the other hand, if the verdict be for the defendant, judgment may be signed and execution issue for costs against the claimant (s. 186).

In ejectment the Court has power to order the plaintiff's costs to be paid by the party really conducting the defence, albeit a stranger to the record, and claiming no interest in the property: *Hutchinson* v. *Greenwood*, 4 E. & B. 324.

(*j*) See *Smith* v. *Tett*, 9 Exch. 307.

(*k*) 2 Burr. 665.

(*l*) 10 Ad. & E. 763.

plaintiff as against the tenant in possession, from the day of the demise laid, or from the date of the title stated in the declaration; and on the authority of the last-mentioned case, it is now well settled, that if properly pleaded it is an estoppel (*m*). It should, perhaps, further be noticed, that, with a view to preventing vexatious litigation (*n*), sect. 93 of the Common Law Procedure Act, 1854, provides that the claimant in a second ejectment, brought for the same premises against the same defendant, may by the Court or a Judge be ordered to give security for costs, with a stay of proceedings until such security shall have been given.

Trespass qu. cl. fr.

Trespass to realty, which, in the next place, demands our attention, differs materially from ejectment in two respects: 1st, Ejectment is founded upon *title*, whereas trespass is founded upon *possession* (*o*); 2ndly, In ejectment, the specific possession of land may be recovered by virtue of the writ of Hab. fac. poss. (*p*), and through the medium of the sheriff; whereas in trespass an award of damages only can be obtained, by the intervention of a jury, as compensation for the injury inflicted on the plaintiff by the tortious act of the defendant (*q*).

Trespass to realty consists in a wrongful and unwarrantable entry upon the soil or *land* (*r*) of another which the law intitles a trespass by '*breaking his close;*' these words

(*m*) Per *Jervis*, C. J., *Wilkinson* v. *Kirby*, 15 C.B. 443; and see *Matthew* v. *Osborne*, 13 C.B. 919, per *Parke*, B., *Doe* d. *Hellyer* v. *King*, 6 Exch. 794; and cases cited ante, p. 768, n. (*h*).

(*n*) See *Doe* d. *Brayne* v. *Bather*, 12 Q. B. 941.

(*o*) Per Lord *Kenyon*, C. J., *Graham* v. *Peat*, 1 East, 243, 246; *Davis* v. *Danks*, 3 Exch. 435. 437.

(*p*) The form of which is given in Reg. Pr. Hil. T., 1853, Sched. Nos. 23, 24.

(*q*) Selw. N. P., 10th edit., vol. 2, p. 685.

(*r*) As to the legal signification of the word "land," see Leg. Max., 2nd edit., pp. 289, 293; post, p. 796.

being derived from the form of the writ of trespass anciently in force, commanding the defendant to shew cause *quare clausum querentis fregit* (*s*). The true meaning and significance of this word 'clausum' is thus clearly explained by Blackstone (*t*): "Every man's land," he says, "is in the eye of the law enclosed and set apart from his neighbour's, and that, either by a visible and material fence, as one field is divided from another by a hedge, or by an ideal invisible boundary existing only in the contemplation of law, as when one man's land adjoins to another's in the same field." Any entry upon, or breach of, a man's close if unauthorised by him, and unjustified by law (*u*), carries necessarily along with it *some* damage or other (*v*). So that proof of the alleged trespass will, without any proof of damage sustained, entitle the plaintiff to a verdict; and the reason of this has been well explained (*x*) as follows: For the vindication of every right there is a remedy; when, therefore, there has been a violation of a right, the person injured is entitled to an action, and, consequently, to at least nominal damages. Such damages being given in order to vindicate the right which has been invaded, and such further or special damages being awarded as may be proper to remunerate and compensate the plaintiff for any specific damage which he has sustained. It is on this principle that a person may support an action of trespass for an unauthorised entry on

(*s*) The statutory form of declaration in trespass to land is, "that the defendant broke and entered certain land of the plaintiff, called" —— "and [depastured the same with cattle]:" C. L. Proc. Act, 1854, Sched. B., No. 25.

(*t*) 3 Com. pp. 209, 210.

(*u*) *Liford's case*, 11 Rep. 52 a; *Randall* v. *Stevens*, 23 L. J., Q. B., 68; *Keyse* v. *Powell*, 2 E. & B. 132. See *Holmes* v. *Newlands*, 11 Ad. & E. 44.

(*v*) Per Lord *Camden*, *Entick* v. *Carrington*, 19 How. St. Tr. 1066; ante, pp. 87, 89, 659.

(*x*) Sedgw. Dams., 2nd edit., p. 133.

his land, although he shew no actual specific damage to have thereby accrued to him; nay, even though the defendant shew that the act in question was positively beneficial to the plaintiff (*y*).

The action of trespass qu. cl. fr. is founded upon actual possession by the plaintiff, i. e. possession by himself, or by his servant (*z*) or agent, of the locus in quo. Should he be out of possession, as, if he has demised it to another, trespass for an entry upon such land will clearly not lie at his suit, the tenant in possession being here the party aggrieved, and being therefore entitled to complain by action at law.

Possession, then, is necessary to the maintenance of trespass qu. cl. fr., and the party in possession will make out a primâ facie case sufficient to entitle him to a verdict by proof of such possession in himself, and of entry by the defendant. This is, of course, equivalent to saying that entry upon the land of another is primâ facie tortious so as to cast upon the defendant the necessity of shewing title in himself or some third person, and proving authority from that person to enter upon the land in question (*a*).

The doctrine just stated, though manifestly founded in common sense and convenience, may sometimes lead to rather singular results. As soon as a person entitled to the possession of land peaceably enters upon it in the assertion of that title, the law immediately vests the actual possession in him who has so entered. "If," says *Maule*, J. (*b*), "there are two persons in a field, each asserting that the

(*y*) Id., ibid.

(*z*) See *Mayhew* v. *Suttle*, 4 E. & B. 347.

(*a*) Per *Wightman*, J., *Jones* v. *Chapman*, 2 Exch. 816 (where the effect of the plea of 'not possessed' is explained, as to which see also per *Jervis*, C. J., *Wilkinson* v. *Kirby*, 15 C. B. 443, *Slocombe* v. *Lyall*, 6 Exch. 119); judgm. *Hayling* v. *Okey*, 8 Exch. 545.

(*b*) *Jones* v. *Chapman*, 2 Exch. 821.

field is his, and each doing some act in the assertion of the right of possession, and if the question is, which of those two is in actual possession? I answer, the person who has the title is in actual possession, and the other person is a trespasser (*c*). They differ in no other respects." It cannot, indeed, be said that in the case here supposed there is a joint possession, or a possession by the two as tenants in common. It cannot be denied that one is in possession and the other a trespasser; which is the trespasser must be determined by the fact of title. And although both are apparently in actual possession, yet the question which of them really is so will depend upon this rule—that the law makes the possession under such circumstances follow the title (*d*). The example thus put by Mr. Justice *Maule* seems specially well adapted to illustrate the elementary rule before adverted to, viz. that the possession of land will suffice to sustain an action of trespass qu. cl. fr. against one who tortiously enters upon it (*e*).

In further illustration of the rule just stated, let us suppose that land is held by A. under B. who is tenant for life, that B. dies, and that A. subsequently to his death being out of actual possession does no act indicating an intention to continue his possession of the premises—As if A. is tenant of a field, which becoming flooded during the win-

(*c*) Hence a person wrongfully holding possession of land cannot treat the rightful owner who enters on the land as a trespasser, for the party entitled to the land acquires by entry the lawful possession of it, so that he may maintain trespass against any person who, being in possession at the time of his entry, wrongfully continues upon the land: Per *Bayley*, J., *Butcher* v. *Butcher*, 7 B. & C. 402 (citing *Taunton* v. *Costar*, 7 T. R. 431); *Hey* v. *Moorhouse*, 6 Bing, N. C. 52.

(*d*) 2 Exch. 821.

(*e*) See also per *Holroyd*, J., *Harper* v. *Charlesworth*, 4 B. & C. 592; Judgm. *Ryan* v. *Clark*, 14 Q. B. 71; *Dyson* v. *Collick*, 5 B. & Ald. 600; and cases cited Broom's Prac., vol. 1, p. 537 (*b*).

ter is not subsequently thereto and after the death of the tenant for life (A.'s landlord) re-occupied by him—In such a case the tenancy would, in fact, have been determined by the death of the tenant for life, and therefore an action of trespass would not be maintainable at suit of A. (*f*). Nor will trespass lie against the occupier of land at suit of a mortgagee who has never been in actual possession, or been seised of the land, and has not obtained a judgment in ejectment for its recovery (*g*). And before entry and actual possession a freeholder cannot maintain trespass for an unlawful entry upon his land (*h*).

In order that trespass qu. cl. fr. may be sustainable, the possession must, however, be *exclusive* (*i*). If, indeed, a meadow be divided and parcelled out annually among the parishioners by lot, then after each person's several portion has been allotted he may sue in trespass for the breach of his several close, because he has an exclusive interest therein for the time being (*k*). So, trespass will lie at suit of one who has an exclusive right or interest in land, the soil of which belongs to another; as the exclusive right to cut turf in a waste belonging to the lord of the manor (*l*). Further, it has been held that a person entitled to the exclusive enjoyment of a growing crop during the proper period of its growth, and until it was cut and carried away, might maintain trespass in respect of such exclusive right;

(*f*) *Brown* v. *Notley*, 3 Exch. 219; *Smith* v. *Milles*, 1 T. R. 475.

(*g*) *Turner* v. *Cameron's Coalbrook Steam Coal Co.*, 5 Exch. 932, *Wheeler* v. *Montefiore*, 2 Q. B. 133, (explained in the judgment, *Doe* d. *Parsley* v. *Day*, 2 Q B. 155).

(*h*) 3 Bla. Com. 210, citing 2 Roll. Abr. 553.

(*i*) *Revett* v. *Brown*, 5 Bing. 7; *Stocks* v. *Booth*, 1 T. R. 428, 430; *Mainwaring* v. *Giles*, 5 B. & Ald. 356; *Greathead* v. *Morley*, 3 M & Gr. 139. See *Holford* v. *Bailey*, 13 Q. B 426; *S C.* 8 Id. 1000, *Holmes* v. *Bagge*, 1 E. & B. 782.

(*k*) 3 Bla. Com. 210.

(*l*) Per Cur. *Wilson* v. *Mackreth*, 3 Burr. 1824, *Welden* v *Bridgewater*, Cro. Eliz. 421.

and one entitled exclusively to the 'vesture' of land, that is, to the corn, grass, underwood, and the like, growing upon it, may have an action of trespass qu. cl. fr. (*m*).

But although it be true that trespass will only lie at suit of one in exclusive possession of land, actual or constructive, our law, which adapts its remedy to the nature of the right invaded, allows in many cases one who is out of possession of land to recover damages in some other form of action for an injury done to it. Thus a reversioner may sue in *case* (though not in trespass) for any injury of a permanent kind done to his reversion. Upon this subject *Cox* v. *Glue* (*n*) is an useful authority. There the plaintiff was seised in fee of land, upon which the burgesses of a certain town had a right during a portion of the year to depasture their cattle, and of which also during such period they were entitled to the exclusive possession. Trespasses having been committed as well to the *surface* as to the *subsoil* of the land in question (whilst in the occupation of the burgesses), it was held, that in respect of the latter (the injury to the subsoil) an action would well lie at suit of the plaintiff (the tenant in fee), but that in respect of the former (the injury to the surface of the land), it would not.

It cannot of course be denied that the possession of the surface of land may be in one person whilst the possession of the subsoil is in another (*o*). The right, for instance, either to the surface or to the subsoil may be derived by grant, or inferred from a long and uniform course of enjoyment

(*m*) *Crosby* v. *Wadsworth*, 6 East, 602; Co. Litt. 4. b.; *Welsh* v. *Hall*, cited 2 Selw. N. P., 10th edit., 1313.

(*n*) 5 C. B. 533. See *Marker* v. *Kenrick*, 13 C. B 188.

(*o*) See the remarks on the maxim, cujus est solum, ejus est usque ad cœlum: Leg Max., 2nd edit., p. 294; ante, p. 81.

which will be supposed to correspond with some interest created by a grant, and trespass, being a remedy given for an interference with possession, may be maintainable at suit of a party entitled to either of the rights just specified, when it has been invaded.

It is, however, important to note this difference between an action for a trespass to land and an action for damage done to the reversion. In the former action, as already stated at page 778, special damage need not be proved with a view to supporting it. In the latter it must be so; that is to say, the plaintiff suing as reversioner, must shew that, by the acts complained of, his reversionary estate and interest were depreciated or lessened in value, or he must shew that the alleged tort was of a kind which was necessarily calculated to prejudice the reversion; and if the declaration be framed in the manner which has been first suggested, and the jury negative actual damage, the defendant will be entitled to a verdict (*p*). The following hypothetical state of facts may serve to illustrate this part of the subject: A. is tenant in possession of an estate under a lease—through this estate runs a public road, which is stopped up by B. (the defendant)—in consequence whereof A. sustains some special and peculiar damage, which will entitle him to an action against B. In this case, however, C., the landlord, who is out of possession, is in nowise damnified by his tenant's being prevented from enjoying his estate in so ample a manner as he might otherwise have done, and he (the landlord) will not be entitled to redress, in the absence of proof of damage to his reversion. That such damage might under the circumstances here supposed really ensue,

(*p*) *Dobson* v. *Blackmore*, 9 Q. B. 991; *Jackson* v. *Pesked*, 1 M & S. 234.

or be reasonably presumable, is extremely probable; for if an obstruction of a public road appeared from its construction to be of a permanent nature, or professed, either by notice affixed, or in any other way, to deny the public right, thus leading to an opinion that no road was there, the value of the estate might be lowered in public estimation, and pecuniary loss might follow for which an action would lie (*q*).

A declaration by a reversioner stated that the plaintiff was entitled to a right of way for his tenants over a certain close of the defendant, and charged that the defendant wrongfully shut and kept fastened a certain gate standing across it, and so obstructed the way in question, and that by means of the premises the plaintiff was injured in his reversionary estate; a verdict having been found for the plaintiff, a motion was made on behalf of the defendant to arrest the judgment on this ground, that the obstruction complained of was not shewn to be an injury of a permanent nature so as to affect the reversion; but the Court of Common Pleas, holding that it *might* be injurious to it, discharged the rule (*r*).

Without entering further upon the subject here mooted, we may conclude that where there is a direct injury to land, and also a consequential damage caused to it, *that* may form the subject-matter either of case or of trespass; but where there is only a direct injury to the soil and freehold, there is no other remedy available than trespass (*s*). In connection

(*q*) Judgm. 9 Q. B. 1004.

(*r*) *Kidgill* v. *Moor*, 9 C. B. 364; See also *Wiltshear* v. *Cottrell*, 1 E. & B. 674; *Barter* v. *Taylor*, 4 B. & Ad. 72; *Tucker* v. *Newman*, 11 Ad. & E. 40; *Young* v. *Spencer*, 10 B. & C. 145; per *Best*, C. J., *Strother* v. *Barr*, 5 Bing. 153; *Alston* v. *Scales*, 9 Bing. 3; *Hosking* v. *Phillips*, 3 Exch. 168.

(*s*) *Weeton* v. *Woodcock*, 5 M. & W. 587, 594.

with torts to the realty, it should also be noticed, that "a man is answerable for not only his own trespass, but that of his cattle also: for if, by his negligent keeping, they stray upon the land of another (and much more if he permits or drives them on), and they there tread down his neighbour's herbage, and spoil his corn or his trees, this is a trespass for which the owner must answer in damages; and the law gives the party injured a double remedy in this case, by permitting him to distrain the cattle thus 'damage-feasant,' or doing damage, till the owner shall make him satisfaction, or else by leaving him to the common remedy *in foro contentioso* by action," wherein, "if any unwarrantable act of the defendant or his beasts, in coming upon the land, be proved, it is an act of trespass for which the plaintiff must recover some damages; such, however, as the jury shall think proper to assess" (*t*).

"In trespasses of a permanent nature," further remarks Blackstone (*u*), "where the injury is continually renewed,"—as by spoiling or consuming the herbage with the defendant's cattle, or by continuing illegally in his dwelling-house after a forcible entry into it (*v*)—"the declaration may allege the injury to have been committed by continuation from one given day to another," "and the plaintiff shall not be compelled to bring separate actions for every day's separate offence (*x*). But where the trespass is by

(*t*) 3 Bla. Com. pp. 211-2.

See a form of declaration in trespass applicable under circumstances such as here supposed, ante, p. 778, n. (*s*).

(*u*) 3 Com. p. 212.

(*v*) *Percival* v. *Stamp*, 9 Exch. 167, 174, where *Parke*, B., says, "It is common learning, that every continuation of a trespass is a fresh trespass. If the defendant continue for more than one day, that may be given in evidence under the ordinary form of declaration, laying the trespasses with a continuando."

(*x*) See 1 Chitt. Pl., 7th ed., p. 408.

one or several acts, each of which terminates in itself, and being once done cannot be done again, it cannot be laid with a *continuando;* yet if there be repeated acts of trespass committed (as cutting down a certain number of trees), they may be laid to be done not continually, but at divers days and times within a given period" (*y*).

In some cases, indeed, a forcible entry on another's land or house is justifiable and shall not be accounted trespass, as if a man comes thither to demand or pay money *there* payable, or to execute in a legal manner the process of the law (*z*). Thus, a landlord may justify entering to distrain for rent; a person may in some cases enter upon his neighbour's land to abate a nuisance (*a*). A commoner may enter to attend his cattle commoning on another's land; a reversioner, to see if any waste be committed on the estate; and, under circumstances of extreme necessity (*b*), or where the law presumes a right of way, an intrusion on another's land may be justified. Moreover, a man may justify entering into an inn or public-house without the leave of the owner first specially asked; because, when one professes the keeping of such inn or public-house, he thereby gives a general license to any person to enter his doors (*c*), such license being of course subject to statutory restrictions, and likewise to this proviso, that there is suit-

(*y*) 3 Bla. Com. p. 212. See *Bowyer* v. *Cook*, 4 C. B. 236; *Holmes* v *Wilson*, 10 Ad. & E. 503.

(*z*) See *Hewitt* v. *Macquire*, 7 Exch. 80; *Ash* v. *Dawnay*, 8 Exch. 237, 243; *Keane* v. *Reynolds*, 2 E. & B. 748.

(*a*) Ante, Bk. I., Chap. 5.

(*b*) Leg. Max., 2nd edit., pp. 2, 3. See *Pinnington* v. *Galland*, 9 Exch. 1, and cases there cited; *Buckby* v. *Cotes*, 5 Taunt. 311; *Proctor* v. *Hodgson*, 24 L. J., Exch., 195. See also the remarks appended to the maxim, Cuicunque aliquis quid concedit concedere videtur et id sine quo res ipsa esse non potuit, Leg. Max., 2nd edit., p. 362.

(*c*) 3 Bla. Com. p. 212.

'Leave and license' may of course be pleaded in an action of trespass qu. cl. fr. See *Hewitt* v. *Isham*, 7 Exch. 77; *Doe* d. *Hudson* v. *Leeds & Bradford R C.*, 16 Q. B. 796.

able accommodation at the innkeeper's disposal, and that the guest applies peaceably for admission and is ready and able to pay reasonable compensation for what he has (*d*).

A man may also justify in an action of trespass on account of the freehold and right of entry being in himself, a defence which brings the title to the estate in question. This, remarks Blackstone (*e*), is therefore one of the ways devised since the disuse of real actions for trying the property in estates; though it is not (for reasons already stated (*f*)), so usual as that by ejectment.

Trespass ab initio

There are one or two rather peculiar principles of our law which, in connection with injuries to real property, invite our notice. "Where," says Blackstone (*g*), "a man misdemeans himself, or makes an ill use of the authority with which the law intrusts him, he shall be accounted a trespasser *ab initio;* as if one comes into a tavern and will not go out in a reasonable time, but tarries there all night contrary to the inclinations of the owner, this wrongful act shall affect and have relation back even to his first entry, and make the whole a trespass. But a bare nonfeasance, as not paying for the wine he calls for, will not make him a trespasser, for this is only a breach of con-

(*d*) Story on Bailm., 5th edit., p. 497; *Rex* v. *Ivens*, 7 Car. & P. 213, *Thompson* v. *Lacy*, 3 B. & Ald. 283, 285; *Hawthorn* v. *Hammond*, 1 Car. & K. 404; Per *Coleridge*, J, *Dansey* v. *Richardson*, 3 E. & B 159.

An innkeeper is not, however, bound to provide for his guest the precise room which the latter may select; all that the law requires of him is to find for his guests reasonable and proper accommodation *Fell* v. *Knight*, 8 M. & W. 269, 276.

As to the obligation of an innkeeper to receive goods, see the remarks per Cur. in *Broadwood* v. *Granara*, 10 Exch. 417, and cases there cited.

As to the liability of an innkeeper for loss of goods belonging to a guest, see *Calye's case*, 1 Smith L. C. 47, post, Sect. 2.

(*e*) 3 Com. p. 214.

(*f*) Ante, p. 777.

(*g*) 3 Com p. 213.

tract for which the tavérner shall have an action of debt or assumpsit against him." Such are the remarks of Blackstone upon the point in question, the law in regard to it being fully stated in *The Six Carpenters' case* (*h*), which has justly been designated (*i*) as "one of the most celebrated in Lord Coke's Reports." The doctrine referred to is in practice most frequently, though not exclusively, applied in connection with trespasses to land, as where he who enters an inn or tavern commits a trespass there, as by carrying anything away; or if the lord who distrains for rent, or the owner for damage feasant, works or kills the distress; or if he who has a right of entry to take one heriot, enters and takes two (*k*); or if a lessor who enters on demised premises to see if waste be done, breaks the house, or stays there all night; or where a commoner cuts down a tree growing on the commonable land. In these and the like cases the law holds that the wrong-doer entered with intention to do the wrongful act of which he subsequently was guilty; and because the act which demonstrates the intention is a trespass, the individual doing it shall be accounted a trespasser ab initio (*l*). A man cannot, however, be made a trespasser by *relation* where the act complained of was lawful at the time when done (*m*).

Ratification of trespass

Another important principle occasionally applicable in

(*h*) 8 Rep. 146 a., and 1 Smith. L. C. p. 62, in the note whereto the more recent cases bearing upon the subject above alluded to are collected. See also Leg. Max., 2nd edit., pp. 221—225; *West* v. *Nibbs*, 4 C. B. 172, 187, *Ash* v. *Dawnay*, 8 Exch. 237; *Percival* v. *Stamp*, 9 Exch. 167, cited ante, p. 785, n. (*v*); *Burdett* v. *Colman*, 14 East, 164; *Ambergate &c. R C.* v. *Midland R. C.*, 2 E. & B 793.

(*i*) 1 Smith L. C. pp. 65–6.

(*k*) *Price* v. *Woodhouse*, 1 Exch. 559.

(*l*) *The Six Carpenters' case*, 8 Rep. 146 b.

(*m*) See *Tharpe* v *Stallwood*, 5 M. & Gr. 760, in connection with which see *Foster* v. *Bates*, 12 M. & W. 226; *Welchman* v. *Sturgis*, 13 Q B. 552; per *Parke*, B, *Vorston* v. *Fether*, 14 M. & W. 854.

trespass qu. cl. fr., the nature and limitations whereof have already been sufficiently defined and illustrated, is that of ratification by a principal of a wrongful act done in his name or on his behalf by a third person. The judgment in *Buron* v. *Denman*, noticed at a former page (*n*), should specially be examined in connection with the subject treated of in the present section.

Amongst torts to realty, besides such as are evidenced by a mere wrongful entry upon land, are to be included nuisances caused and injuries done, whether by negligence or design, to the lands or buildings of another. In regard to torts of this latter kind, I may content myself with referring to a former portion of this work below indicated (*o*), and to the cases there cited and commented on touching the injuries in question. As exhibiting the nature of and remedy for a nuisance at common law, the following remarks (*p*) are offered:—

Nuisance to realty, &c.

A *private* 'nuisance' has been defined to be "anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another" (*q*). "If," says Blackstone (*r*), "one erects a smelting house for lead so near the land of another that the vapour and smoke kills his corn and grass and damages his cattle therein, this is held to be a nuisance; and by consequence it follows, that if one does any other act, in itself lawful, which yet, being done in that place, necessarily tends to the damage of another's property, it is a nuisance; for it is incumbent on him to find some other place to do that act where it will be less of-

(*n*) Ante, p. 711.

(*o*) Ante, pp. 81-3. *Nicklin* v. *Williams*, 10 Exch. 259, and cases cited post. n. (*t*); *Gayford* v. *Nicholls*, 9 Exch. 702; *Clegg* v. *Dearden*, 12 Q. B. 576.

(*p*) Which are in part extracted from Bla. Com., vol. 3, Chap 13

(*q*) 3 Bla. Com. p. 216.

(*r*) 3 Com. p. 217.

fensive." So also, if my neighbour ought to scour a ditch or cleanse and keep in repair a drain and neglects to do so, whereby my land is overflowed and my goods are damaged, this is an actionable nuisance (*s*).

Many other analogous torts to property, falling within the class now before us, and resulting from non-observance of the maxim *sic utere tuo ut alienum non lædas* (*t*), will, without doubt, readily suggest themselves to the reader. Thus, if a man builds a house so close to mine that his roof overhangs my premises and throws the water off his roof upon them, this is a nuisance for which an action on the case will lie (*u*), even without proof that water has thus fallen or been discharged upon my land (*x*). Likewise, to erect a house or other building so near to mine that it obstructs my ancient lights and windows, is a nuisance of a similar nature (*y*). In this latter case, indeed, it was formerly held, that a party could not maintain an action for such an obstruction unless he had gained a right in the lights by prescription; and in conformity with this rule it was usual to state in the declaration that the house was an ancient house, wherein were ancient windows through which the light had entered, and had been used to enter, from time immemorial (*z*). But afterwards it was held, that, upon evidence of an adverse enjoy-

Obstructing ancient lights

(*s*) 3 Bla. Com. p. 218; *Alston* v. *Grant*, 3 E. & B. 128.

(*t*) Leg Max, 2nd edit., p. 274, where many cases are cited illustrating the nature of a nuisance to real property. See also *Chauntler* v. *Robinson*, 4 Exch. 163; *Richards* v. *Rose*, 9 Exch. 218, and cases cited ante, p. 676, n. (*a*); pp. 719—722 *Lawrence* v *The Great Northern R. C.*, 16 Q. B. 643.

(*u*) *Penruddock's case*, 5 Rep 100.

(*x*) *Fay* v. *Prentice*, 1 C. B. 828; *Baten's case*, 9 Rep. 53 b. See *Pickering* v. *Rudd*, 1 Stark. N. P. C. 56.

(*y*) 3 Bla. Com. p. 216.

(*z*) Selw. N. P., 10th edit., vol. 2, p. 1108.

ment of lights for twenty years or upwards unexplained, a jury might be directed to *presume* a right by grant or otherwise, even though no lights had existed there before the commencement of the twenty years (*a*). Though, if the period of enjoyment fell short of twenty years, then formerly other circumstances than the mere length of time must have been brought in aid in order to raise a presumption of the plaintiff's right (*b*); and now, by the 6th section of the Prescription Act (2 & 3 Will. 4, c. 71), it is enacted, that, in the several cases mentioned therein and provided for thereby, "no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed, for any less period of time or number of years" than is mentioned in the statute as applicable to the particular case. It becomes, then, necessary in this place to state, shortly the more important provisions of the Act alluded to, which has a most important bearing upon the law concerning nuisances, the obstruction of ancient lights, the diversion of running water, and so forth.

First, then, in reference to the subject already touched upon;—by section 3 of the Prescription Act it is enacted, that "when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of *twenty* years *without interruption* (*c*), the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

(*a*) Id. 1109.

(*b*) Id., ibid.

(*c*) See *The Plasterers' Co.* v. *The Parish Clerks' Co.*, 6 Exch. 631; post, p. 793.

What, under this section, is to be understood by user 'without interruption' will presently appear; but I may at once observe, that the effect of the clause before us is to convert into a right such an enjoyment only of the access of light over contiguous land as has been had for the whole period of twenty years *in the character of an easement,* distinct from the enjoyment of the land itself (*d*);—the species of 'negative' easement (as it has been termed), to which a right may be acquired under the section just cited, being put on the same footing in this respect as those 'positive' easements provided for (as will immediately be seen) by other sections of the Act, all of which, after long enjoyment *as* easements, are invested with the quality of rights (*d*).

If the party entitled to the use of ancient windows alters and enlarges them, he does not thereby, according to a recent decision of the Court of Queen's Bench, entirely lose the right which he had before enjoyed of having light and air through such portions of the actually existing windows as formed portions of the ancient windows before the alteration;—he, however, acquires nothing by the act of alteration in addition to his former right, and if by the alterations made he has exceeded the limits of that right, and has put himself into such a position that the excess cannot be obstructed by the owner of the adjoining land in the exercise of his lawful rights on his own land, without at the same time obstructing the former right of the owner of the dominant tenement, this latter party must be deemed responsible for the existence of such a state of things, and must be considered to have lost the former right which he had; at all events until he shall, by restoring his windows to their original state, throw upon the owner of the servient

(*d*) Judgm. *Harbidge* v. *Warwick*, 3 Exch. 556–7.

tenement the necessity of so arranging his buildings as not to interfere with the right originally possessed (*e*).

Prescriptive right to easement—how acquired

The 2nd section of the Prescription Act is very material with reference to many rights and easements differing in kind from that just adverted to: it enacts, that "no claim which may be lawfully made at the common law by custom, prescription, or grant, to any *way* or other easement, or to any *watercourse*, or the *use of any water* to be enjoyed or derived upon, over, or from any land or water" of any person, when such way or other matter "shall have been actually enjoyed by any person claiming a right thereto *without interruption* for the full period of *twenty* years, shall be defeated or destroyed by shewing only that such way or other matter was first enjoyed at any time prior to such period of twenty years; *but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated;* and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of *forty* years, the right thereto shall be deemed absolute and indefeasible, *unless* it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing" (*f*).

Under the foregoing section, it has been held that a right claimed by user can only be co-extensive with the user (*g*); that twenty years user will not avail to establish

(*e*) *Renshaw* v. *Bean*, 18 Q. B. 112, 129, 130 (where the cases are collected).

(*f*) See also sect. 8 of the Prescription Act; *Palk* v. *Shinner*, 22 L. J., Q. B., 27.

(*g*) *Davies* v. *Williams*, 16 Q. B. 546. See *Flight* v. *Thomas*, 10 Ad. & E. 590.

An immemorial right of way is not necessarily lost by mere non-user for twenty years: *Ward* v. *Ward*, 7 Exch. 838; *Reg.* v. *Chorley*, 12 Q. B. 515.

a right to the thing used, unless the owner of the servient tenement is capable of giving a right such as claimed by express grant (*h*); that a 'contentious' enjoyment during the full statutory period of twenty years will not suffice to confer a right (*i*); that the user must be exercised *as of right* against all persons (*k*). In regard to the point last specified, and in explanation of the restrictive statutory words (printed in italics), which provide that the claim put forward "may be defeated in any other way by which the same is now liable to be defeated," the following remarks fell on a recent occasion (*l*) from Mr. Baron *Martin:* "Before the Statute," observes that learned Judge, "a person who claimed a way by prescription alleged a user as of right from the time of legal memory, and consequently, if it could be established that there was unity of possession *at any time,* that defeated the presumed right. Therefore, whenever there was reason to apprehend that the prescriptive right of way might have been extinguished by unity of possession, it was usual to claim it as a way by non-existing grant; and some Judges left it to the jury to find a grant, while others treated the question as one of law, and directed the jury to presume a grant;" then came the stat. 2 & 3 Will. 4, c. 71, (s. 2), containing the words in question; "therefore, by analogy to the prior law, it is evident that the claim may be defeated by shewing a unity of possession within twenty years. The subsequent part of the section shews beyond all doubt what was the meaning

(*h*) *The Rochdale Canal Co.* v. *Radcliffe*, 21 L J., Q. B., 297.

(*i*) *Eaton* v. *Swansea Waterworks Co.*, 17 Q. B. 267.

(*k*) *Winship* v. *Hudspeth*, 10 Exch. 5; *Tickle* v *Brown*, 4 Ad. & E. 369. See sect. 5 of the Prescription Act; *Holford* v. *Hankinson*, 5 Q. B. 584.

(*l*) *Winship* v. *Hudspeth*, supra, citing *Bright* v. *Walker*, 1 Cr. M & R. 211.

of the legislature; for it says, that, where the way shall have been so enjoyed for the full period of forty years, 'the right thereto shall be deemed absolute and indefeasible,' thus drawing a distinction between an enjoyment for twenty years and forty years" (*m*).

Further, it is important to observe, that, by s. 4 of the Prescription Act, "each of the respective periods of years" hereinbefore mentioned "shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question," and "no act or other matter shall be deemed to be an interruption within the meaning of this statute unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorising the same to be made." The effect of this section, coupled with those clauses of the Act already adverted to, is—that the period of the duration of enjoyment of that to which a right is asserted under the statute should be for the whole period of twenty, thirty, or forty years, respectively specified therein, up to the commencement of the suit. And although the acts of user need not necessarily continue down to the very moment of action brought, yet some act of that kind must at all events be shewn to have been exercised within a year before the commencement of the suit (*n*).

(*m*) See also *Onley* v. *Gardiner*, 4 M & W. 496; *Thomas* v. *Thomas*, 2 Cr. M. & R. 34; Per *Bayley*, B., *Canham* v. *Fisk*, 2 Tyr. 155.

(*n*) *Lowe* v. *Carpenter*, 6 Exch. 825 (citing *Parker* v. *Mitchell*, 11 Ad. & E. 788; *Carr* v. *Foster*, 3 Q. B. 581; *Ward* v. *Robins*, 15 M & W. 241); and *Flight* v. *Thomas*, 11 Ad. & E. 688; *S. C.* 8 Cl. & F. 231; (as to which, see the remarks per Cur. *Eaton* v. *Swansea Waterworks Co.*, 17 Q. B. 272), are important decisions with reference to what is above shortly stated

I will, in the next place, say somewhat as to that particular species of nuisance which consists in the wrongful diversion or abstraction of water from a stream or watercourse; and as introductory to this part of the subject a few elementary remarks are needed.

Land—how distinguished from water in legal contemplation.

The word 'land,' says Sir E. Coke (*o*), in legal contemplation "comprehendeth any ground, soil, or earth whatsoever, as meadows, pastures, woods, moors, *waters*, marshes, furzes, and heath;" upon which passage Blackstone observes (*p*) as follows:—"It is observable that *water* is here mentioned as a species of land, which may seem a kind of solecism, but such is the language of the law; and therefore I cannot bring an action to recover possession of a pool or other piece of water by the name of 'water' only, either by calculating its capacity, as for so many cubical yards, or by superficial measure, for twenty acres of water, or by general description, as for a pond, a watercourse, or a rivulet; but I must bring my action for the land that lies at the bottom, and must call it twenty acres of *land covered with water*. For water is a moveable wandering thing, and must of necessity continue common by the law of nature. So that I can only have a temporary, transient, usufructuary property therein; wherefore, if a body of water runs out of my pond into another man's, I have no right to reclaim it. But the land which that water covers is permanent, fixed, and immoveable, and therefore in this I may have a certain substantial property of which the law will take notice."

Such being the distinction between 'land' and 'water' in legal contemplation, let us, somewhat more minutely, inquire respecting the nature of the right to the use and

(*o*) Co. Litt. 4. a.

(*p*) 2 Com. p. 18.

enjoyment of running water possessed by a riparian proprietor.

Right to flowing water

Flowing water, it has been observed, as well as light and air, is in one sense *publici juris*. It is a boon from Providence to all, differing from the other elements, however, in its mode of enjoyment. Light and air are diffused in *all* directions, flowing water in *some*. When property was established, each one had the right to enjoy the light and air diffused over and the water flowing through the portion of soil belonging to him; the property in the water itself was not in the proprietor of the land through which it passed, but only the use of it, as it passed along, for the enjoyment of his property, and as incidental to it (*q*); *aqua currit et debet currere* is the language of the law; and whether the right to natural streams be *ex jure naturæ*, or by acquiescence and the presumed grant of neighbours (the former of which opinions seems now to be established as correct (*r*)), the rule is, that, "primâ facie, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, but *there is no property in the water*. Every proprietor has an equal right to use the water which flows in the stream, and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors who may be affected by his operations, no proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above" (*s*). Subject to such restrictions,

(*q*) Judgm. 3 Exch. 775; judgm. 6 Exch 369.

(*r*) Judgm. *Dickinson* v. *Grand Junction Canal Co.*, 7 Exch. 229.

(*s*) Per Sir *J Leach*, V. C., *Wright* v. *Howard*, 1 S. & S. 203, adopted per Cur. *Mason* v. *Hill*, 3 B. & Ad. 312; *S. C.* 5 Id. 1; and in *Acton* v. *Blundell*, 12 M. & W. 348-9

however, each riparian owner is entitled to the usufruct of the stream for all reasonable purposes—ex. gr. to drink, to water his cattle, or to turn his mill—and each such owner has a remedy for the infringement of his right. If the stream be diverted by altering its course (*t*), or cutting down its banks, or if the water be abstracted from it for unauthorised purposes, the owner will have his right of action on the case against the wrongdoer (*u*).

Right to artificial watercourse.

The right of an individual to an *artificial* watercourse, *as against the party creating it*, will depend, however, upon the character of the watercourse and the circumstances under which it was created. For the diversion of such a watercourse no action will lie, where, from the nature of the case, the enjoyment of it obviously depended upon temporary circumstances, and was not of a permanent character, and where the interruption was by the party who stood in the situation of the grantor. The flow of water for twenty years, accordingly, from the eaves of a house, would not give a right to the neighbour to insist that the house should not be pulled down or altered so as to diminish the quantity of water flowing from the roof. Nor would the flow of water during twenty years from a drain made for the purposes of agricultural improvements give a right to the neighbour, so as to preclude the proprietor from alter-

(*t*) See *Northam* v. *Hurley*, 1 E. & B. 665; *Embrey* v. *Owen*, 6 Exch. 353, 372.

The statutory form of declaration for diverting water from a mill, alleges "that the plaintiff was possessed of a mill, and by reason thereof was entitled to the flow of a stream for working the same; and the defendant, by cutting the bank of the said stream, diverted the water thereof away from the said mill:" C. L. Proc. Act, 1852, Sched. (B.). No. 30.

(*u*) Judgm. 7 Exch. 301; Judgm. *Wood* v. *Waud*, 3 Exch. 780, 781; *Embrey* v. *Owen*, 6 Exch. 353; *Rochdale Canal Co.* v. *King*, 14 Q. B. 122.

ing the level of his drains for the greater improvement of his land. In such a case, the state of circumstances shews that one party never intended to give, nor the other to enjoy, the use of the stream *as a matter of right* (*x*).

Right to subterranean water.

In *Acton* v. *Blundell* (*y*), and *Dickinson* v. *The Grand Junction Canal Co.* (*z*), the law relative to the right to *subterranean* water was considered. From these cases we deduce, that the rules regulating the right in question are not always identical with those applicable to the enjoyment of streams and waters above ground, especially where the result would be to limit the full enjoyment of the rights of property in the neighbouring owner, and to prevent him from extracting minerals from his own soil, or making some other beneficial use of it. When water is on the surface, the right of the owner of the adjoining land to the usufruct of that water is not a doubtful matter of fact, it is public and notorious; and such a right ought, as a matter of course, to be respected by every one. In like manner, if the course of a subterranean stream were well known—as where a stream sinks under ground, pursues for a short space a subterraneous course, and then emerges again—it seems clear that the owner of the soil under which the stream flowed could maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover if the stream had been wholly above ground. Where, however, the existence and state of underground water are unknown, and perchance unascertainable, as where a well is sunk, and afterwards there

(*x*) *Wood* v. *Waud*, 3 Exch. 776—778; *Greatrex* v. *Hayward*, 8 Exch. 291; *Arkwright* v. *Gell*, 5 M. & W. 203. See *Magor* v. *Chadwick*, 11 Ad. & E. 571.

(*y*) 12 M. & W. 324, cited ante, pp 79, 81.

(*z*) 7 Exch. 282.

is a difficulty in knowing certainly how much, if any, of the water when the ground was in its natural state belonged to the owner in right of his property in the soil, and how much belonged to that of his neighbour who in digging a mine or another well, which drains the water from that previously sunk, may possibly be only taking back his own, a rule of law different from that above enunciated may properly be applied—at all events where the statutory period of prescription has not run (*a*).

In any of the cases latterly considered, the *remedy* at common law by action on the case will, as of course, be available, if a *right* can be shewn to have been invaded.

Lastly,—from what has been said in the foregoing pages, touching the more important—when practically regarded—of ordinary torts (*b*) to realty, will be inferred the solicitude of our law so to regulate the rights of property, that, whilst its free use and enjoyment by each individual are not unduly interfered with, the privileges legally vested in every other member of the community may be respected.

SECT. II.—*Of Torts to Personal Property.*

Chattels personal—what.

Chattels *personal* are, strictly speaking, "things moveable: which may be annexed to or attendant on the person of the owner, and carried about with him" from one place to another (*c*). Such are animals of various kinds, household furniture, money, jewels, corn, articles of clothing, and

(*a*) See this subject amply discussed in the judgm. 12 M. & W. 349—352, Judgm. 7 Exch. 300.

(*b*) Further information as to which, together with references to additional cases, may be met with in Selw. N. P., vol. 2, under the titles "Nuisance," "Trespass"

(*c*) 2 Bla. Com., p. 387, 3 Id., p. 144

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everything which can properly be transferred from place to place (*d*).

Torts to personalty—how classified.

Now, in discussing, so far as space will permit, the ordinary torts to personalty, it will be convenient to treat, 1st, Of torts to property in the possession of the owner; 2ndly, Of torts to property out of the owner's possession, and especially (as included in this subdivision of the subject) of torts to chattel property under bailment to another, when committed,—1. By the bailee himself. 2. By a stranger.

Torts to personalty in possession.

First, then, a tort to personalty in the possession of the owner may be constituted by the wrongful deprivation of that possession; or by an abuse of, or a damage done to, the chattel whilst in his possession (*e*). A wrongful deprivation of possession may be by a taking illegal in its inception; or by an illegal detention of that whereof the original possession was legally acquired (*e*),—torts, however, of this latter kind will evidently fall under the second of the two leading classes of wrongs to personalty above indicated.

It may readily be conceded, that, where a *rightful* possession of goods and chattels has once been gained, either by a just occupancy or by a legal transfer, whoever, whether by force or fraud, dispossesses the holder of them is guilty of a tort (*e*), remediable according to circumstances in trespass, trover, or case, the respective characteristics whereof have been already briefly pointed out (*f*)—"for" as remarked by Blackstone (*g*), "there must be an end of all social commerce between man and man, unless private possessions be secured from unjust invasions; and if an acquisition of

(*d*) Id., ibid.; 2 Kent Com., 7th ed., p. 400, where the distinction between chattels real and chattels personal is fully considered.

(*e*) 3 Bla. Com. p. 145.

(*f*) Ante, pp. 125—128.

(*g*) 3 Bla. Com. p. 145.

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goods by either force or fraud were allowed to be a sufficient title, all property would soon be confined to the most strong or the most cunning; and the weak and simple-minded part of mankind (which is by far the most numerous division) could never be secure of their possessions."

But—further—it is also a true proposition, that one who is in possession of a chattel *wrongfully*, as regards some particular individual, provided he be rightfully possessed of it quoad the defendant, may sue this latter party for a tort done to the specific chattel. The decision in *Armory* v. *Delamirie* (*i*), clearly established that "bare possession constitutes a sufficient title to enable the party enjoying it to obtain legal remedy against a mere wrong-doer" (*k*). It was there held, that one who had found a jewel might maintain trover for it against a jeweller, whose opinion had been asked respecting it, and who, having got possession of it, tortiously retained it, and applied it to his own use. The Court in this case further resolved, that the finder of the jewel, though he did not by such finding acquire an absolute property or ownership in it, yet had such a property therein as would entitle him to keep it against all but the rightful owner. When, therefore, it is said that the action of trover "only lies where the plaintiff has the right to possession, as well as a *legal property* in the subject of the suit" (*l*), we must remember that there are two kinds of property—absolute and special—*absolute* property is where one having the possession of chattels, has also the *exclusive*

(*i*) 1 Smith L. C. 151. (See per *Pollock*, C. B., commenting upon the above case, *White* v. *Mullett*, 6 Exch. 714.) *Bridges* v. *Hawkesworth*, 21 L. J., Q. B., 75 (which forcibly illustrates the principle above stated in the text).

(*k*) 1 Smith L. C., pp. 151-2.

(*l*) Per *Tindal*, C. J., *Owen* v. *Knight*, 4 Bing. N. C. 57; ante, p. 754.

right to enjoy them—which right can only be defeated by some act of his own—*special* property is where he who has the possession holds them subject to the claims of other persons (*m*). But besides the right *of property* in the goods sued for, there must be a right to their *possession* in order to support trover. Thus in *Gordon* v. *Harper* (*n*), chattels, which had been let as furniture with a house, having been wrongfully taken in execution by the sheriff, it was held, that, although the tenant might doubtless have sued the sheriff in trover for the value of the things taken, yet the landlord could not do so, inasmuch as he had parted with the right of possession during the continuance of the term. Where, however, the two rights (already specified) of property and of possession concur, trover is the remedy usually resorted to for the particular injury of withholding goods from the custody of their rightful owner (*o*), and (as it is technically termed) 'converting' them to the use of the wrongdoer. The meaning of this term 'convert' or 'conversion,' as just used, will presently be considered. But one apt example may previously be adduced in support of the proposition just stated, viz. that trover lies where the rights of property and of possession are concurrently vested in the plaintiff, and as shewing the nature of the questions, often nice and difficult, which arise in reference to its practical application (*p*).

In *Scattergood* v. *Sylvester* (*q*), the facts were these, the

(*m*) Per *Lawrence*, J., *Webb* v. *Fox*, 7 T. R. 398.

(*n*) 7 T. R. 9; and see the cases cited post, in connection with the law of bailment.

(*o*) The class of cases in which detinue may be available as a remedy for the detention of goods is sufficiently pointed out, ante, pp. 121, 154.

(*p*) See *Manders* v. *Williams*, 4 Exch. 339.

(*q*) 15 Q. B. 506.

plaintiff's cow had been stolen, and subsequently sold in market overt to the defendant who purchased it bonâ fide; the plaintiff, having discovered the thief, prosecuted and convicted him, and then brought trover against the defendant for the cow which he had refused to deliver up. Now, it is evident, that, if in this case the plaintiff had been compelled to rely solely on the common law in support of his title to the cow, he would have been defeated in his action, because at common law the property had been permanently changed by the sale in market overt. The statute 7 & 8 Geo. 4, c. 29, contains however a provision (s. 57) to this effect, that, if any person guilty of stealing any property shall be indicted for such offence by or on behalf of the owner, and convicted thereof—in such case the property shall be restored to the owner or his representative; and although by the same section of the Act the Court may in a summary way order its restitution, yet it was held that this mode of procedure is but cumulative, leaving the remedy by action still available, and that the effect of the statutory provision just noticed is to restore the right even where the property is not actually restored. The thing stolen, said *Coleridge*, J. (*r*), "is to be restored on conviction; it is to be given up to the owner as having the right—that is—the right of property and the right of possession."

If we glance at the form of declaration in trover given in the First Common Law Procedure Act (*s*), we shall see that the gist of the charge is, that the defendant "*converted* to his own use, or wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods;" it may be desirable, therefore, to inquire, what is the meaning of the

(*r*) 15 Q. B. 512; *Valpy* v. *Gibson*, 4 C. B. 837; *Bloxam* v. *Sanders*, 4 B & C. 941.

(*s*) Sched. (B), No. 28. See *Buckland* v. *Johnson*, 15 C. B. 145.

word 'converted,' here used? A 'conversion' is, where one finding or having the goods of another in his possession applies them to his own use without the consent of the owner (*t*), and such application to the finder's use is, in many cases, evidenced by a demand of the goods and a refusal to give them up (*u*) "A person," says Lord *Ellenborough* (*x*), "is guilty of a conversion who intermeddles with my property and disposes of it." Trover, says *Maule*, J. (*y*), "only lies where some dominion is asserted by the defendant over the chattel which is the subject of the action. One who takes possession of goods unlawfully, which are in consequence lost to the owner, is to a certain extent guilty of a conversion. But where . . . there is no unlawful taking of possession or assertion of dominion over the goods, although the goods may be destroyed, there is no conversion," unless the defendant is a participator in the act which causes their destruction (*y*). "In order to constitute a conversion," observes *Parke*, B. (*z*), "there must be an intention of the defendant to take to himself the property in the goods, or to deprive the plaintiff of it. If the entire article is destroyed, as, for instance, by burning it, that would be a taking of the property from the plaintiff and depriving him of it, although the defendant might not be considered as appropriating it to his own use." A conversion, then, may be evidenced by a wrongful taking of the goods of him who has a right to the immediate possession of them—or by the fact that the defendant has destroyed the goods in question, or has participated in their destruction—it may be evidenced

(*t*) Toml. L Dict., ad verb. 'Conversion.'

(*u*) 10 Rep 56 b, 57 a

(*x*) *Stephens* v. *Elwall*, 4 M & S 261

(*y*) *Heald* v. *Carey*, 11 C. B. 993.

(*z*) *Simmons* v. *Lillystone*, 8 Exch 442, and see the cases cited ante, p 127, n. (*b*), *Jones* v. *Davies*, 6 Exch. 663.

by the fact that the defendant has wrongfully and unlawfully asserted title to or assumed dominion over the chattel which is the subject of the suit (*a*); and in cases like the above, no formal demand of the goods and refusal to deliver them need in strictness be shewn in order to support an action for their recovery. A demand and refusal are, however, necessary "in all cases where the defendant became in the first instance lawfully possessed of the goods, and the plaintiff is not prepared to prove some distinct actual conversion" (*b*) of them. And yet authorities may be adduced to shew that a party is not necessarily guilty of a conversion, because he does not *at once* restore the chattel which is the subject of dispute, as, for instance, where it is not at the moment of demand made in his possession, or under his immediate control (*c*). A re-delivery of the chattel, however, is in trover no answer to the action, nor does it compensate for the previous conversion, ex. gr., if one man take away another's horse, though he afterwards return it, the owner of the horse has a right of action as against him who wrongfully took it away, and the re-delivery goes only in mitigation of damages (*d*); but the judgment in trover changes the property in the chattel converted (*e*).

From what has been thus far said, it may be inferred that the action of trover is peculiarly adapted for trying the title to goods. It is, indeed, commonly brought with this

(*a*) See *Towne* v. *Lewis*, 7 C. B. 608; *Powell* v. *Hoyland*, 6 Exch. 67; *Wiles* v. *Woodward*, 5 Exch. 557; *Glover* v. *The London & N. W. R. C.*, 5 Exch. 66; *Howard* v. *Shepherd*, 9 C. B. 297.

(*b*) 1 Chitt. Pl., 7th ed., p. 176, 2 Wms. Saund. 47 e.; Judgm. *Stevenson* v. *Newnham*, 13 C. B. 303. See *Valpy* v. *Sanders*, 5 C. B. 886; *Atwood* v. *Ernest*, 13 C. B. 881; *Giles* v. *The Taff Vale R. C.*, 2 E. & B. 822.

(*c*) Per *Wilde*, C. J., 7 C. B. 611; *Canot* v. *Hughes*, 2 Scott, 663.

(*d*) Per *Pollock*, C. B., *Griffiths* v. *Owen*, 13 M. & W. 63.

(*e*) *Buckland* v. *Johnson*, 15 C. B. 145, 157.

express object by or against the assignees of bankrupts or insolvents—by or against personal representatives, or by a judgment creditor against a sheriff—who, perchance, has wrongfully sold goods under an execution posterior in point of time to that issued by the plaintiff. The remedy in question is appropriate, also, in many other cases where conflicting claims to chattel property call for adjustment.

Quite irrespective of mere technicalities, there is a broad distinction to notice between the action just considered and that which lies for a wrongful and forcible taking of goods and chattels or for a direct injury done to them. In trover, the conversion not the taking is the gist of the action. Trespass de bonis asportatis, however, lies for the wrongful taking of chattels (*f*). In *Put* v. *Rawsterne* (*g*), it is said, that "trover and trespass are actions *sometimes* of a different nature," for trover will sometimes lie where trespass will not lie—"as if a man hath my goods by my delivery to keep for me, and I afterwards demand them and he refuses to deliver them, I may have an action of trover but not trespass," "because here was no tortious taking; and sometimes the case may be such that either the one or the other will lie; as where there is a tortious taking away of goods and detaining them the party may have either trover or trespass." In *West* v. *Nibbs* (*h*) (already cited (*i*)), trover was held to lie, although trespass would not do so, by virtue of the rule that a mere nonfeasance cannot constitute a trespass. On the other hand, cases might readily be put, in which either trespass or trover would be a proper remedy (*j*).

(*f*) See *Smalley* v *Kerfoot*, Stra. 1094.

(*g*) Sir T. Raym. 472; Judgm. *Newnham* v. *Stevenson*, 10 C. B. 722.

(*h*) 4 C. B. 172.

(*i*) Ante, p. 126, n. (*x*).

(*j*) Ante, p. 126.

As against a mere wrongdoer, indeed, who sells goods which he has forcibly taken, and receives the proceeds, the party from whose possession they were taken may waive the tort altogether, and maintain an action for money had and received, without proving any title to the goods beyond mere possession (*k*). "If," it has been said (*l*), "a man's goods are taken by an act of trespass, and are subsequently sold by the trespasser and turned into money, he may maintain *trespass* for the forcible injury; or, waiving the force, he may maintain *trover* for the wrong; or, waiving the tort altogether, he may sue for *money had and received.*"

To entitle a man, however, to bring trespass de bonis asportatis, he must, at the time when the act was done which constitutes the trespass, either have the actual possession in him of the thing which is the object of the trespass, or else he must have a constructive possession in respect of the right being actually vested in him (*m*); the nature of what is called a 'constructive' possession may be illustrated by reference to the case of an executor whose right to the goods of the testator accrues immediately on his death, and such right draws after it a constructive possession—so that an executor may maintain trespass for goods of the testator taken between the death and grant of probate (*n*). The same rule, also, applies in the case of an

(*k*) *Oughton* v. *Seppings*, 1 B. & Ad. 241; *Neate* v. *Harding*, 6 Exch. 349; *Powell* v. *Rees*, 7 Ad. & E. 426. See *Buckland* v. *Johnson*, 15 C. B. 145, 166, 167.

(*l*) Judgm. *Rodgers* v. *Maw*, 15 M. & W. 448; Judgm. *Clark* v. *Gilbert*, 2 Bing. N. C. 357.

(*m*) Per *Ashhurst*, J., *Smith* v. *Milles*, 1 T. R. 480; *Brierly* v. *Kendall*, 17 Q. B. 937; *Bradley* v. *Copley*, 1 C. B. 685. See also, in support of what is above said, *Watson* v. *Macquire*, 5 C. B. 836, 844; *White* v. *Morris*, 11 C. B. 1015.

(*n*) *Tharpe* v. *Stallwood*, 5 M. & Gr. 761; *Foster* v. *Bates*, 12 M. & W. 233.

administrator who may sue in trespass for goods taken between the death and the grant of letters of administration, —by virtue of which relation, as appears by a recent decision (*o*), the administrator is enabled to recover against such persons as have interfered with the estate, and thereby to prevent it from being prejudiced and despoiled.

In regard to the latter of the two kinds of injuries (specified at p. 801,) which may be offered to things personal whilst in the possession of the owner, consisting in an abuse of or damage done to them, ex. gr., by hunting a man's deer, shooting his dogs, poisoning his cattle, or in anywise taking from the value of any of his chattels, or making them in a worse condition than before, it will suffice to say that the remedies given by our law to redress such injuries are, 1, by action of trespass, where the act is in itself immediately injurious to another's property; and, 2, "by special action on the case, where the act is in itself indifferent and the injury only consequential." Under either form of action damages will be recoverable in proportion to the injury which the complainant proves by apt evidence that his property has sustained (*p*).

Torts to personalty out of the owner's possession.

Torts to personalty, whilst de facto out of the owner's possession, may occur under many dissimilar circumstances, as where the chattel wrongfully seised or injured is in the custody of the law (*q*), or under bailment to another. In reference to the latter state of facts, a few remarks may properly be offered.

Bailment—its nature.

A bailment is "a delivery of a thing in trust for some special object or purpose, and upon a contract,—express or

(*o*) *Morgan* v. *Thomas*, 8 Exch. 302.

(*p*) 3 Bla. Com. pp. 153-4.

(*q*). *Turner* v *Ford*, 15 M & W. 212; *Wilbraham* v. *Snow*, 2 Wms. Saund. 47 a.

implied,—to conform to the object or purpose of the trust" (r). Two ingredients are indeed essential to and must be presented (under some form or other) in every satisfactory definition of a bailment—a delivery and a trust—this latter term being used to signify the confidence which one man reposes in another (s).

Now, it will be at once obvious, that the nature of a bailment may admit of illustration in an infinite variety of ways—thus,—if cloth be delivered to a tailor to make a suit of clothes, he takes it upon an implied contract, viz. to make the clothes in a workmanlike manner, and to deliver them to his customer when made.—He is therefore a bailee (t). And so is a pawnbroker who receives plate or jewels as a pledge or security for the repayment of money lent thereon—the contract or trust being in this case to keep the thing pledged with ordinary care and diligence and to restore it upon redemption, i. e. upon repayment of the money advanced upon it by the pawnor. So, if a man takes in cattle to graze and depasture on his land—he is a bailee—(this particular kind of bailment being technically termed an agistment)—and the bailee takes the cattle in this case on an implied contract or undertaking that he will look after them with ordinary diligence,—which means,—with that degree of diligence which men in general exert in respect to their own concerns (u).

In any of the foregoing instances of bailments it will be found that there is a delivery of the subject-matter of the

(r) Story Bailm., 5th ed., p. 4. The definition given by the above learned writer seems preferable to that in 2 Bla. Com. p. 451.

(s) See Toml. L. Dict. ad verb. 'Trust.'

(t) 2 Bla. Com. p. 451:

(u) 2 Bla. Com. p. 452; Story Bailm., 5th ed., pp. 15—19.

bailment and a trust, i. e., a confidence reposed by the bailor and a corresponding undertaking by the bailee.

Bailments. Class 1. Trust for exclusive benefit of bailor.

The classification of bailments usually adopted (*x*) is into three great heads (*y*), whereof the first comprises bailments, in which the trust is *exclusively for the benefit of the bailor*—it includes, therefore, *mandates* and *deposits*, terms doubtless used more frequently by the civil than by the common law writers, but still not alien to our system of jurisprudence. A 'deposit' is commonly defined to be a naked bailment of goods to be kept for the bailor gratuitously, and returned when he shall require it, and a 'mandate' is likewise a gratuitous bailment of goods to be carried and conveyed from one place to another, or made with a view to some act being performed about them. Now, in the case of a mandate or deposit (between which there is no distinction to be noted material for the present inquiry), the bailment is made for the benefit of the bailor, and the law applicable to these cases is that the bailee is bound merely to use a slight degree of diligence respecting the thing bailed and is liable for gross negligence only—the reason being that the bailee is to receive nothing for his services.

The celebrated case of *Coggs* v. *Bernard* (*z*), falls within the general class of bailments now under consideration. There the plaintiff declared, that, whereas the defendant undertook and promised safely and securely to take up

(*x*) Story Bailm., 5th ed., s. 3; 1 Smith L. C., note to *Coggs* v. *Bernard*.

(*y*) For the following brief sketch of the leading classes of bailments, I am almost wholly indebted to the late Dr. Story's admirable treatise upon that subject. This general acknowledgment will obviate the necessity of repeated reference to the work in question.

(*z*) Ld. Raym. 909; and 1 Smith L. C. p. 82.

certain hogsheads of brandy out of a cellar where they were deposited and to lay them down in another place, he so negligently and carelessly put them down again, that, by his negligence, one of the casks was staved and a quantity of brandy spilt. After verdict, an objection was taken to this declaration on the ground that it contained no averment that the defendant was a common carrier (in which case, as we shall presently see, peculiar responsibilities would have been cast on him), or that he was to have received anything for his services; and the simple question consequently was, whether a man not being a common carrier, who undertakes gratuitously to carry goods or to perform some act in connection with them, is liable for any and what degree of negligence in the performance of his undertaking: the decision come to in this case established the law relating to contracts of mandate as it has been above stated; and in the course of his judgment, Lord *Holt* took occasion minutely to consider the various classes and subdivisions of bailments, together with the legal principles applicable to them.

Instances of the kind of bailment to which I have been now referring do not very often present themselves in our modern law reports; they do, however, sometimes occur, as in *Doorman* v. *Jenkins* (*a*), and *Rooth* v. *Wilson* (*b*), in the former of which, *Taunton*, J., after remarking upon the difficulty of determining what is gross negligence, for which alone a mandatary or depositary is liable, remarks that there may be cases where this question will be matter of law more than of fact, and others again where it will be matter of fact more than of law (*c*). So, in regard to the

(*a*) 2 Ad. & E. 256.

(*b*) 1 B. & Ald. 59, ubi vid. Per Lord *Ellenborough*, C. J.; see also *Mytton* v. *Cock*, 2 Str. 1099; *Dartnall* v. *Howard*, 4 B. & C. 345; *White* v. *Humphery*, 11 Q. B. 43.

(*c*) See *Melville* v. *Doidge*, 6 C. B. 450.

question what is to be deemed reasonable care, the absence of which will indicate gross negligence? Dr. Story (*d*) observes, that, being a bailee without reward, the depositary is bound to slight diligence only, "but in every case good faith requires that he should take reasonable care of the deposit, and what is reasonable care must materially depend upon the nature, value, and quality of the thing [bailed], the circumstances under which it is deposited, and sometimes upon the character and confidence and particular dealings of the parties."

Further, it is necessary to observe, in connection with the particular class of bailments under consideration, that even a gratuitous bailee who accepts his trust for the benefit of the bailor will, if possessed of skill with reference to the specific subject-matter of the bailment, be bound to use it—for instance,—a person conversant with horses might be answerable for damage happening to a horse whilst under his gratuitous care or management, for which an individual not so skilled might be in no degree responsible (*e*).

With respect to bailments purely gratuitous, one question may with good reason be asked—can a contract to accept such a bailment and to discharge its resulting duties be enforced—would not an action for the purpose of enforcing it or obtaining damages for its nonperformance fail by reason of the maxim—*Ex nudo pacto non oritur actio?* The answer is, that such an action would fail, and that the party who has entered into a gratuitous contract of the kind supposed may relieve himself from liability before performance by a simple refusal to discharge the trust. If, however, he accept the bailment, he will thereby render

(*d*) Bailm., 5th edit., p. 63.
(*e*) *Wilson* v. *Brett*, 11 M. & W. 113.

himself liable for negligence (of the degree before specified) during its continuance. This liability results directly from the rule cited at a former page (*e*), that "the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in its performance;" and it is, accordingly, generally true with respect to gratuitous contracts, that for *nonfeasance*, even when a party suffers a damage thereby, no action lies, but for *misfeasance* an action will lie (*f*).

Bailments. Class II. Trust for exclusive benefit of bailee.

Next in order of the three leading classes of bailments, already adverted to, is that in which the trust is exclusively for the benefit of the bailee, and in which the thing bailed is usually to be restored in specie. A bailment of this kind was denominated in the civil law *commodatum*, in ours it is called a *loan*, and the degree of diligence here required from the bailee is very much, if not precisely, that required from a gratuitous bailee possessing skill, who, as above stated, is bound to exercise the skill which he possesses; the reason being, that a gratuitous bailee for use must be taken, in point of law, to have represented himself to the bailor as a person of competent skill—a much greater degree of diligence will therefore be expected from him than from one who is a mere gratuitous bailee for the benefit of the bailor. The law applicable to the class of bailees now in question, is explained in *Wilson* v. *Brett* (*g*) already cited, illustrated to some extent by *Lord Camoys* v. *Scurr* (*h*), and commented on by Lord *Campbell*, C. J., in *Dansey* v. *Richardson* (*i*), and by Lord *Holt* in *Coggs* v. *Bernard*, where the

(*e*) P. 684; see *Shillibeer* v. *Glyn*, 2 M. & W. 143.

(*f*) Story Bailm., 5th ed., pp. 13, 185, et seq.; *Rulfe* v. *West*, 12 C. B. 466, cited ante, p. 684.

(*g*) 11 M. & W. 113, 115.

(*h*) 9 Car. & P. 383.

(*i*) 3 E. & B. 167.

latter eminent Judge takes occasion to observe, that the party to whom a loan of chattels is made gratuitously "is bound to the strictest care and diligence to keep the goods [lent] so as to restore them back again to the lender;" for the bailee, having a benefit by the use of them, will be answerable if guilty of the least neglect, as if a man should lend another a horse to go westward, or for a month, and the bailee go northward, or keep the horse above a month—if any accident happen to the horse in the northern journey, or after the expiration of the month, the bailee will be chargeable, —because he has made use of the horse contrary to the trust under which he was lent; and it may be, if he had been used no otherwise than as had been intended, the accident would not have happened.

One ordinary instance of the above kind of bailment occurs in the case of a gratuitous or simple loan of money (*k*). And in connection, either with the present or the preceding class of bailments (for the facts as reported do not enable us positively to say to which it may belong), should be mentioned—*Nicholls* v. *Bastard* (*l*), which shews, that, if chattel property be taken wrongfully out of the possession of a gratuitous bailee, he may sue for it in trover in his own name, or the bailor may sue—the former having a special, and the latter an absolute property in the chattel (*m*).

Bailments. Class III. Trust for benefit of both parties.

To the third class of bailments, in which the trust is for the benefit of both parties, is referable the law relative to *vadium*, the pledging or pawning of a chattel, and that relating to *locatio-conductio*, a bailment for reward or compensation, which may not improperly be regarded as

(*k*) As to the relation which subsists between a banker and his customer, ante, p. 467.

(*l*) 2 Cr. M. & R. 659.

(*m*) Ante, pp. 802-3.

divisible into as many sub-classes as there are different modes of employing care or labour upon goods (*n*), the more important of these subdivisions being (*o*): 1. The hiring of a thing for use (*locatio rei*). 2. The hiring of work and labour (*locatio operis faciendi*). 3. The hiring of care and services to be performed or bestowed on the thing delivered (*locatio custodiæ*). 4. The hiring of the carriage of goods from one place to another (*locatio operis mercium vehendarum*). The class of bailments before us is, then, obviously far more comprehensive and practically important than either of the two kinds previously mentioned (*p*), embracing, inter alia, bailments to pawnbrokers, innkeepers, and carriers, as to each of which successively some few observations are subjoined.

It may, however, in this place be well to premise that the general rule applicable where the bailment is reciprocally beneficial to both parties to it is, that ordinary diligence on the part of the bailee is required, so that (to put the converse of the rule) he will be responsible for ordinary neglect. The degree of care or diligence required in this third class of bailments is therefore intermediate between that required from a bailee in the first and in the second class.

Pawnee—liability of.

A pledge or pawn may be defined to be "a bailment of goods to a creditor, as security for some debt or engagement" (*q*); and with respect to it, the rule deducible from the judgment of Lord *Holt* in *Coggs* v. *Bernard* is, that "the pawnee is bound to use ordinary diligence in the care and safeguard of the pawn" (*r*), so that, if the thing

(*n*) 1 Smith L. C., p. 98 a.

(*o*) Story Bailm., 5th ed., p. 11.

(*p*) Ante, pp. 811, 814.

(*q*) Story Bailm., 5th ed., p. 10; Per Lord *Holt*, C. J., Ld. Raym. 916.

(*r*) 1 Smith L. C., pp. 99—100.

pawned be lost notwithstanding the exercise of such diligence, the pawnee may still resort to the pawnor for the amount of the debt secured by the pawn "If," says Lord *Holt*, "the pawn be such as it will be the worse for using, the pawnee cannot use it, as clothes, &c.; but if it be such as will be never the worse, as if jewels for the purpose were pawned to a lady, she might use them, but then she must do it at her peril; for whereas if she keeps them locked up in her cabinet, if her cabinet should be broke open and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robbed of them, she will be answerable; and the reason is, because the pawn is in the nature of a deposit, and as such is not liable to be used (*s*). But if the pawn be of such a nature as the pawnee is at any charge about the thing pawned, to maintain it, as a horse, cow, &c., then the pawnee may use the horse in a reasonable manner, or milk the cow, &c., in recompense for the meat" (*t*).

The pawnee, however, is bound to give up to its lawful owner the thing pawned, upon a tender of the amount due to himself; and consequently if the chattel in question be lost after such tender has been made, the pawnee will be responsible as having made himself a wrongdoer by his detention of the pawn, and if a man keep goods by wrong, he will be answerable for them *at all events* (*u*). Subject to the qualified property in the goods pawned thus transferred to the pawnee, the pawnor retains his property in them, and as incident to such property, he has a right to sell the chattel pledged; and when this right has been exercised, the

(*s*) Citing Owen, 123

(*t*) See also Story Bailm 5th ed, pp. 337-8

(*u*) Per Lord *Holt*, C J, *Coggs* v. *Bernard*, 2 Ld. Raym 917.

purchaser has the same interest in the chattel which the pawnor had (*x*), so that in an action of trover brought for it by the pawnor against the pawnee, on repayment of the amount for which the thing was pledged, the jus tertii might, in general, successfully be set up (*y*).

The business of pawnbrokers is regulated by the statute law (*z*), which, inter alia, provides, that, if the pledge be not redeemed at the expiration of a year and a day, the pawnbroker may then expose it to sale as soon as he can consistently with the provisions of the Act; but if, at any time before the sale has actually taken place, the owner of the chattel pawned tender the principal and interest due, together with the expenses (if any) incurred, he is entitled to a return of the chattel; for the power of sale is allowed the pawnbroker merely to secure to him the money which he has advanced, together with the high rate of interest which the law allows to him in his character of pawnbroker (*a*). Should the forfeited pledge, however, be sold, in accordance with the power of sale given by the Act, the question presents itself,—is the pawnbroker to be regarded as warranting the title of the chattel sold? In *Morley* v. *Attenborough* (*b*) the Court of Exchequer, after an examination of the earlier cases, came to the conclusion that there is no implied warranty of *title* on the sale of goods; and that, if there be no fraud, a vendor is not liable for a bad title, unless there is an express warranty, or an equivalent to it, by declarations or conduct. Usage of trade,

(*x*) *Franklin* v. *Neate*, 13 M. & W. 481, 486. See *Reeves* v. *Capper*, 5 Bing. N. C. 136; *Flory* v. *Denny*, 7 Exch. 581.

(*y*) *Cheesman* v. *Exall*, 6 Exch. 341.

(*z*) 39 & 40 Geo. 3, c. 99 (amended by 9 & 10 Vict. c. 98). See *Attenborough* v. *London*, 8 Exch. 661; *Fergusson* v. *Norman*, 5 Bing. N. C. 76.

(*a*) Per *Abbott*, C. J., *Walter* v. *Smith*, 5 B. & Ald. 439, 441.

(*b*) 3 Exch. 500.

they remarked, if proved as a matter of fact, would, of course, be sufficient to raise an inference of such an engagement; and, without proof of such usage, the very nature of the trade may be enough to lead to the conclusion that the person carrying it on must be understood to engage that the purchaser shall enjoy that which he buys as against all persons(*c*). Applying these remarks to the case of a pawnbroker selling a forfeited pledge eo nomine, we infer that he must be considered as selling *merely the right to the pledge which he himself had* (*d*), as undertaking merely that the subject of sale is a pledge, and is irredeemable, and that he (the vendor) is not cognisant of any defect of title to it. Under the circumstances here supposed, accordingly, a pawnbroker selling a forfeited pledge would not be liable to refund the purchase money if the vendee

(*c*) In *Sims* v. *Marryat*, 17 Q. B. 291, Lord *Campbell*, C. J., after citing and approving of the judgment delivered by *Parke*, B., in *Morley* v. *Attenborough*, supra, proceeds thus:—"It may be, that the learned Baron is correct in saying, that, on a sale of personal property, the maxim caveat emptor does by the law of England apply; but, if so, there are many exceptions stated in the judgment which will well nigh eat up the rule. Executory contracts are said to be excepted, so are sales in retail shops, or where there is an usage of trade: so that there may be difficulty in finding cases to which the rule would practically apply." See further, as to the point above adverted to, *Westropp* v. *Solomon*, 8 C. B. 345, and cases there cited.

(*d*) See *Chapman* v. *Speller*, 14 Q. B. 621.

In *Morley* v. *Attenborough*, 3 Exch. 514, the Court, however, further observe as follows:—"It may be, that though there is no implied warranty of title, so that the vendor would not be liable for a breach of it to unliquidated damages, yet the purchaser may recover back the purchase-money as on a consideration that failed, if it could be shewn that it was the understanding of both parties that the bargain should be put an end to, if the purchaser should not have a good title. But if there is no implied warranty of title, *some circumstances must be shewn to enable the plaintiff to recover for money had and received.*" See *Gompertz* v. *Bartlett*, 23 L. J., Q. B., 65; *S. C.*, 2 E. & B. 849.

should afterwards be compelled to restore the chattel to some third party, as being the rightful owner of it.

Innkeeper —liability of.

The liability of an innkeeper for the loss of a guest's property whilst sojourning at his inn rests, not on mere reason, but on custom, growing out of a state of society no longer existing (*e*). By legal implication, the property of the guest is deemed to be in the actual care and custody of the innkeeper, who is, with some rare exceptions, held responsible for its safety (*f*). Upon this subject *Calye's case* (*g*) is the leading authority, whence we deduce that, in order to charge a person with the responsibilities of an innkeeper, it must be shewn that he is the keeper of a common 'inn' (*h*), i. e. of a house where the traveller is furnished with everything which he has occasion for whilst upon his way (*i*).

Assuming the above condition to be satisfied, an innkeeper's liability seems closely to resemble—though it is not altogether so great as—that which attaches to a common carrier by our customary law. "An innkeeper," says *Bayley*, J. (*k*), "is primâ facie liable for any loss not occasioned by the act of God or the king's enemies, although he may be exonerated where the guest chooses to have his goods under his own care;" the latter part of this remark being well illustrated by the case of *Burgess* v. *Clements* (*l*). The rule as to an innkeeper's liability seems, indeed, sub-

(*e*) Per *Coleridge*, J., 3 E. & B. 159.

(*f*) Per *Wightman*, J., 3 E. & B. 155.

(*g*) 8 Rep. 32, and 1 Smith L. C. 47; *Bennett* v. *Mellor*, 5 T. R. 273.

(*h*) 'Inn,' hospitium, diversorium.

(*i*) Per *Bayley*, J, *Thompson* v. *Lacy*, 3 B. & Ald. 286.

(*k*) *Richmond* v. *Smith*, 8 B. & C. 9. See, however the remarks on this dictum, which is certainly somewhat too broadly expressed, Story Bailm., 5th edit, p. 499.

Kent v. *Shuckard*, 2 B. & Ad 803, shews that there is no distinction between money and goods as regards the innkeeper's liability.

(*l*) 4 M. & S. 306.

stantially to be that indicated by the words of the writ in *Calye's case*, which alleges that 'by the custom of the realm innkeepers are obliged to keep the goods and chattels of their guests who are within their inns(*m*) without subtraction or loss day and night, so that no damage in any manner shall thereby come to their guests from the negligence of the innkeeper or his servants.' The presumption of negligence from the mere fact of loss will, accordingly, be against the innkeeper; but it will be open to him to repel this presumption, by shewing that there has been no negligence on his part whatsoever(*n*), or that the loss is attributable to the personal negligence of the guest(*o*), or to the act of God, or to vis major(*p*), or that the goods when the loss occurred were in the custody and under the control, not of himself, but of his guest.

An innkeeper, however, is responsible for the loss of goods, only when they were received by him in that character; if not so received, his liability will have to be determined by reference to the law of bailments generally(*q*).

Boarding-house keeper—liability of.

The liability of a boarding-house keeper in respect of the property of a guest who is lodging with him has not in any decided case been very certainly defined; it seems clearly, however, to be less than that of an innkeeper. But a boarding-house keeper is, at all events, bound to exhibit ordinary care towards the guest and his goods—to take as much care

(*m*) See *Jones* v. *Tyler*, 1 Ad. & E. 522.

(*n*) *Dawson* v. *Chamney*, 5 Q. B. 164.

(*o*) *Armistead* v. *Wilde*, 17 Q. B. 261.

(*p*) See *Walker* v. *The British Guarantee Ass.*, 21 L. J., Q. B., 257; Story Bailm., 5th edit., pp. 29—32.

(*q*) Story Bailm., 5th edit., p. 513. As to the lien of an innkeeper, see *Broadwood* v. *Granara*, 10 Exch. 417, and cases there cited; *Smith* v. *Dearlove*, 6 C. B 182,—of a livery-stable keeper, see *Parsons* v. *Gingell*, 4 C. B. 545,—of a trainer of race-horses, see *Forth* v. *Simpson*, 13 Q. B. 680.

of the goods of the guest as an ordinarily prudent housekeeper would take of his own (*r*). How far the keeper of a boarding-house may be answerable for the negligence of his servant, and what may be the precise extent and limits of the maxim *respondeat superior*, in case of a loss of property resulting to the guest from such negligence, the authorities do not as yet enable us to determine (*s*).

Land carriers—liability of

A bailee of goods, with a view to their being conveyed by him from place to place, may, it is conceived, fill one or other of the four following characters: 1. He may be a gratuitous bailee, in which case, as already shewn (*t*), he will be liable merely for gross negligence, and bound only to exercise slight diligence in reference to the goods entrusted to him. 2. He may be a bailee for hire,—though not charged upon any custom of the realm—and bound accordingly to a greater degree of diligence (*u*). 3. He may be a common carrier; or 4. He may belong to some particular class of carriers, whose liabilities are regulated by the statute law. To land carriers falling within either of the two last-mentioned of the foregoing classes will the following observations be restricted. In perusing them, the reader will remember that several of the recent decisions, which by force of sect. 7 (*v*) of the 17 & 18 Vict. c. 31 (The Railway and Canal Traffic Act) are no longer applicable to companies brought within the scope of its provisions, are still binding as authorities in other cases, and must not therefore be wholly lost sight of. It cannot, however, be denied that

(*r*) *Dansey* v. *Richardson*, 3 E. & B. 144.

(*s*) *Dansey* v. *Richardson*, supra, where the Court of Queen's Bench was equally divided in opinion as to the above question.

(*t*) Ante, p. 811.

(*u*) See *Ross* v. *Hill*, 2 C. B. 877, where the action was brought for loss of luggage against a cab driver, *not* charged as a common carrier: *Willoughby* v. *Horridge*, 12 C. B. 742.

(*v*) Post, p. 829.

the decisions alluded to (*w*), inasmuch as Railway and Canal Companies have to a great extent monopolised the inland carrying trade of the country, are now invested with comparatively little value or importance.

A land carrier exercising his calling according to the custom of the realm, that is, publicly undertaking to carry for hire the goods of such as choose to employ him (*x*), is by the common law looked upon as an *insurer*, so that in the event of the goods entrusted to him being lost or damaged, to use the words of Sir W. Jones (*y*), "nothing will excuse him except the act of God or of the king's enemies;" the 'act of God' being understood to signify inevitable acci-

(*w*) Those decisions more particularly which have reference to the validity of notices issued in regard to the conveyance of cattle by railway companies.

(*x*) The question,—Who is a common carrier? is considered in Story Bailm., 5th edit., p. 521.

The master and owner of a general ship is primâ facie a common carrier; his responsibility, however, may be enlarged or qualified by the terms of the bill of lading: *Laveroni* v. *Drury*, 8 Exch. 166, 173.

(*y*) Bailm. p. 104.

"To give due security to property," says *Best*, C. J., in *Riley* v. *Horne*, 5 Bing. 220, "the law has added to that responsibility of a carrier which immediately rises out of his contract to carry for a reward, namely, that of taking all reasonable care of it, the responsibility of an insurer. From his liability as an insurer, the carrier is only to be relieved by two things, both so well known to all the country when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not, namely, the act of God and the king's enemies."

Again, in *Coggs* v. *Bernard*, 2 Ld. Raym. 918, Lord *Holt*, C. J., observes, that the law charges a common carrier "to carry goods against all events but acts of God and of the enemies of the king. For, though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable; and this is a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any

dent, and by the 'king's enemies' being meant public enemies with whom the nation is at open war (*z*).

The operation of the above general rule (which was subject to some few and unimportant exceptions merely), being found prejudicial to carriers, was in practice greatly restricted by issuing notices limiting the carrier's liability, and acceded to as between himself and his customers. The precise modus operandi thus adopted for the protection of the carrier was as follows:—a notice was issued by the carrier, stating that 'he would not be accountable for any property above a certain value, unless insured and paid for at certain extra rates at the time of delivery.' To this notice, *if proved to have come to the knowledge of the customer* (*a*), his assent was implied—so that the carrier was protected accordingly, except, indeed, in the case of wilful misfeasance or gross negligence, which was held not to be within the scope or purview of the notice or within the intention of the parties.

In *Riley* v. *Horne* (*b*), the effect of notices such as above alluded to was much considered, and the liability attaching to a carrier, as the law stood prior to the stat. 11 Geo. 4 & 1 Will. 4, c. 68, was briefly defined per Cur.; it is there said, "that a carrier is an insurer of the goods which he carries; that he is obliged for a reasonable reward to carry any goods to the place to which he *professes to carry*

dealings with them, by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be discovered: and this is the reason the law is founded upon in that point." See also, as to the liability of a common carrier, *Bourne* v. *Gatliffe*, 11 Cl. & F. 45; *S. C.* 7 M. & Gr. 850; 3 Id. 643.

(*z*) Story Bailm. 5th edit., ss. 511, 526. See *Morewood* v. *Pollok*, 1 E. & B. 743.

(*a*) See *Rowley* v. *Horne*, 3 Bing. 2; Judgm. *Riley* v. *Horne*, 5 Bing. 223; *Clark* v. *Gray*, 4 Esp. 177-8.

(*b*) 5 Bing. 217, 224.

goods that are offered him (*c*) if his carriage will hold them, [and he is informed of their quality and value" (*d*)]; and further, that "if he does not ask for this information, or if, when he asks and is not answered, he takes the goods, he is answerable for their amount whatever that may be; that he may limit his responsibility as an insurer by notice, but that a notice will not protect him against the consequences of a loss by gross negligence."

Such being, in brief, the liability of a carrier for loss of or damage done to goods entrusted to him at common law, the operation of the Carriers Act (11 Geo. 4 & 1 Will. 4, c. 68) upon his liability has been this:—As regards certain articles enumerated in the 1st section of the Act, including (amongst other things) gold or silver coin, jewellery, bills, bank notes, securities for the payment of money (*e*), pictures, plate, china, silks, furs, or lace, being articles possibly of much value although of little bulk, it is provided that the carrier shall not be liable for the loss of or any injury to any parcel containing such articles—*when exceed-*

(*c*) "At common law a carrier is not bound to carry for every person tendering goods of any description, but his obligation is to carry *according to his public profession*. . . . . A person may profess to carry a particular description of goods only; for instance, cattle or dry goods, in which case he could not be compelled to carry any other kind of goods · or he may limit his obligation to carrying from one place to another, as from Manchester to London; and then he would not be bound to carry to or from the intermediate places. Still, until he retracts, every individual (provided he tenders the money at the time, and there is room in the conveyance) has a right to call upon him to receive and carry goods according to his public profession." Per *Parke*, B., *Johnson* v. *The Midland R. C.*, 4 Exch. 372, 373. which case is cited by the same learned Judge, 7 Exch. 712; *Crouch* v. *The London and North Western R. C.*, 14 C. B. 255.

(*d*) A carrier is not in all cases entitled to know the nature of goods tendered to him for carriage, see per *Jervis*, C. J, and *Maule*, J., 14 C. B. 291, 294--5.

(*e*) See *Stoessiger* v. *South Eastern R. C.*, 3 E. & B. 549.

ing in value 10*l.*, unless the value and nature of the article shall have been declared, at the time of its delivery, by the person sending or delivering the parcel, and an *increased charge* for carriage, or an engagement to pay the same, be accepted by the party receiving it (*d*). By sect. 2 the carrier will be entitled to demand, for the carriage of any parcel containing any of the articles specified in the 1st section of the Act, an increased rate of charge to be notified by some *notice* (*e*) affixed in legible characters in some public and conspicuous part of the office or *receiving house* (*f*) of the carrier, in which case the party forwarding goods will be bound by the notice without any further proof being given of its having come to his knowledge. By sect. 3 the carrier must also (if required so to do) give a receipt to the sender for the amount paid for carriage of any article the value of which has been declared as above mentioned; and "if such receipt shall not be given when required, or such notice as aforesaid shall not have been affixed," the carrier will be disentitled to any benefit or advantage under the Act, but will be responsible as at common law and liable to refund to his customer the increased rate of charge paid by him.

Again, the 4th section of the Act invalidates all *notices* issued for the purpose of limiting the carrier's liability in respect of articles not enumerated in its 1st section. By

(*d*) By sect. 7, where any parcel has been delivered to the carrier, its value and contents declared, and an increased rate paid for carriage, the customer may, in the event of the parcel being lost or damaged, recover the increased charge so paid, in addition to the value of the parcel. See, further, as to the measure of damages in an action for loss of or damage done to goods confided to a common carrier, sect. 9.

(*e*) See *Owen* v. *Burnett*, 4 Tyr. 134 a.

(*f*) See sect. 5 of the above Act; *Syms* v. *Chaplin*, 5 Ad. & E. 634.

sect 6, nothing in the Act shall "extend or be construed to annul or in anywise affect any *special contract*" which may be entered into between a common carrier and another party for the conveyance of merchandise and goods, and which may *in express terms* limit the carrier's liability. Sect. 8 further provides, that nothing in the Act contained "shall be deemed to protect any mail contractor, stage-coach proprietor, or other common carrier for hire from liability to answer for loss or injury to any goods or articles whatsoever, arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his or their employ, nor to protect any such coachman, guard, book-keeper, or other servant from liability for any loss or injury occasioned by his or their own personal neglect or misconduct."

Now, the first general remark to be made with reference to the Carriers Act is, that, neither by it nor by the special contract between parties (if there be one), are common carriers brought into the position of ordinary bailees for hire. They still continue common carriers, and liable to all the duties attaching to them in that character, except so far as they are qualified by the statute, where the statute applies,—or by the special contract, where the special contract applies (*g*). It has been held accordingly, on various occasions, that railway companies invested by statute with permissive powers to act as carriers, become, if they avail themselves thereof, subject to the liabilities imposed on common carriers by our customary law (*h*). Bearing this in mind, we shall find, that, under the statute, all persons

(*g*) Per *Maule*, J., *Butt* v. *The Great Western R. C*, 11 C B 152.

(*h*) See *Palmer* v. *The Grand Junction R. C.*, 4 M & W. 749, 766; *Pickford* v. *The Grand Junction R C.*, 10 M. & W. 399, 422.

sending goods of a particular description and value by a carrier, when they deliver them at his office, are bound to give him information of their nature and value (*i*). If the *sender* of the goods omits to give this information, he will be disentitled to sue the carrier for loss (*k*) of the goods, even, it seems, where occasioned by gross negligence, at all events, provided there be no wilful neglect, no misfeasance, nor abandonment of the character of carrier (*l*), and no evidence of a felonious act by his servant, causing a loss of or injury to the goods; for, in this latter case, the statute would not afford protection, and proof of gross negligence would suffice to fix the carrier with liability (*m*).

Another condition, however, must be fulfilled, in order that the carrier may be entitled to demand an extra charge for carrying the goods specified in the 1st section of the Carriers Act, he must comply with the requirements of the 2nd section of the Act, in putting up the notice in his office; he must also give a receipt, if required, for the amount paid for carriage.

(*i*) *Hart* v. *Baxendale*, 6 Exch. 769; *Smith* v. *The London, Brighton and South Coast R. C.*, 7 C. B. 782.

(*k*) The 1st section of the Act applies to protect the carrier, where the chattel is either abstracted, lost, or injured whilst in his personal care, but not in cases where the owner of the article suffers or sustains damage from the neglect of the carrier to deliver in due time: *Hearn* v. *The London and South Western R. C.*, 24 L. J., Exch., 180.

(*l*) See *Hinton* v. *Dibbin*, 2 Q. B. 646; *Wyld* v. *Pickford*, 8 M. & W. 443, as explained by *Jervis*, C. J., in *Butt* v. *The Great Western R. C.*, 11 C. B. 150; *Smith* v. *London and Brighton R. C.*, 7 C. B. 782. The meaning of the term "*gross negligence*" is examined minutely in the judgment in *Austin* v. *The Manchester, Sheffield, and Lincolnshire R. C.*, 10 C. B. 474--5.

(*m*) Sect. 8, as explained per *Platt*, B., *Machu* v. *The London and South Western R. C.*, 2 Exch. 432 (who observes, that "its effect is to take out of the operation of the statute all losses occasioned by felony on the part of persons who, in case of loss, might be treated as *servants* of the carrier"): *Butt* v. *The Great Western R. C.*, 11 C. B. 140, 151.

Such being the effect of a notice restricting the carrier's liability, whether at common law or under the provisions of the Carriers Act, it becomes necessary to examine the effect and operation of the recent stat. 17 & 18 Vict. c. 31, which applies, however, exclusively to Railway and Canal Companies, and moreover expressly provides, that nothing therein contained shall alter or affect the rights, privileges, or liabilities of any such company under the 11 Geo. 4 & 1 Will. 4, c. 68, with respect to articles of the descriptions mentioned in that Act. The Railway and Canal Traffic Act has reference then to articles not brought within the provisions of the prior statute—especially to cattle and other animals, which form so important an item in the carrying trade of our great companies. The 7th section of the Act alluded to enacts, that every company to which it applies (*n*), "shall be liable for the loss of, or for any injury done to any horses, cattle, or other animals, or to any articles, goods, or things in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, *notwithstanding any notice, condition, or declaration made and given by such company* contrary thereto, or in anywise limiting such liability; *every such notice, condition, or declaration being hereby declared to be null and void:* provided always that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things, as shall be adjudged by the Court or Judge before whom any question relating thereto shall be tried, to be just and reasonable. Provided always,

(*n*) See sect. 1 (the interpretation clause).

that no greater damages shall be recovered for the loss of or for any injury done to any of such animals, beyond the sums" specified in the Act (*o*), "unless the person sending or delivering the same to such company shall, at the time of such delivery, have declared them to be respectively of higher value" than that mentioned in the Act, "in which case it shall be lawful for such company to demand and receive, by way of compensation for the increased risk and care thereby occasioned, a reasonable per-centage upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge; and such per-centage or increased rate of charge shall be notified in the manner prescribed in the statute 11 Geo. 4 & 1 Will. 4, c. 68, and shall be binding upon such company in the manner therein mentioned (*p*): Provided also, that the proof of the value of such animals, articles, goods, and things, and the amount of the injury done thereto, shall in all cases lie upon the person claiming compensation for such loss or injury."

Prior to the Railway and Canal Traffic Act above in part set out, a *special contract* for the conveyance of goods or cattle between a railway company and their customer (which, as already shewn, was unaffected by the Carriers Act (*q*)), was usually evidenced by some memorandum appended to the receipt given at the Company's receiving house for goods, &c. brought thither for conveyance by train, the carriage of which was paid there; and to the validity of such a contract the signature of the consignor (or his agent) was held not to be indispensable or essential, provided that

(*o*) That is to say,—for any horse 50*l.*; for any neat cattle, per head, 15*l.*; for any sheep or pigs, per head, 2*l.*

(*p*) Ante, p. 826.

(*q*) Sect. 6, cited, ante, pp. 826–7.

his assent to the restrictive conditions put forth by the company could from the facts adduced in evidence fairly and reasonably be inferred (*r*). Consequent on the decisions of our Courts touching the special contracts referred to, a wide immunity from liability was enjoyed by railway companies acting as carriers of cattle or goods, to curtail which within more reasonable limits the 17 & 18 Vict. c. 31, s. 7, (which, it must be remembered, applies to such goods and articles merely as are not within the provisions of the Carriers Act,) provides that "no special contract" between a railway or canal company and any other parties "respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things," as in the statute mentioned, "shall be binding upon or affect any such party *unless the same be signed by him or by the person delivering such animals, articles, goods, or things* respectively for carriage."

Assuming that the requirements of the above-cited statute are duly observed, the *Great Northern Railway Company* v. *Morville* (*s*) shews clearly in what manner a special contract may, in any case falling within its provisions, be made available to limit the liability of a railway company as common carriers. There the plaintiff brought his action against the company for damage done to a horse belonging to him whilst being conveyed upon their line; and the question turned entirely upon the effect of a memorandum or ticket signed by the plaintiff on payment of the charge for carriage, which on the face of it, in express terms, stated that it was "issued subject to the owner's

(*r*) See per *Coleridge*, J., *The Great Northern R. C.* v. *Morville*, 21 L. J., Q. B., 319; *The York, Newcastle, and Berwick R C.* v. *Crisp*, 14 C. B. 527, and cases there cited; *Walker* v. *The York and North Midland R. C.*, 2 E. & B. 750, 762.

(*s*) 21 L. J., Q. B., 319

undertaking to bear all the risk of injury by conveyance and other contingencies;" and further stated that the company would not be responsible for any alleged defects in their carriages, &c., "nor for any damages, however caused, to horses, &c. travelling upon their railway." The plaintiff's horse having sustained injury by reason of a concussion whilst travelling on the defendants' line, the question was, whether the railway company were liable or not; and the Court held that they were not—because the 6th section of the Carriers Act leaves it free to any carrier to make a special agreement with a person sending goods by his conveyance; and under the circumstances a special agreement, —the terms of which were sufficiently large to relieve and absolve the company from responsibility for the damage done,—was proved to have been entered into. The additional cases below cited will suffice to shew how effectually the liability attaching to a railway company as common carriers may, by means of a special contract, be restricted (*t*).

Prior to the recent statute, 17 & 18 Vict. c. 31, it was held, that a special contract would relieve from liability a railway company undertaking to deliver goods to a consignee *beyond the limits of* its own line, but declaring that it would not be responsible for any loss of or damage done to such goods beyond certain limits specifically indicated; and that where a railway company receives

(*t*) *Shaw* v *The York and North Midland R. C.*, 13 Q. B. 347; *Austin* v. *The Manchester, Sheffield, and Lincolnshire R. C.*. 16 Q. B. 600, and 10 C. B. 454; *Carr* v. *The Lancashire and Yorkshire R. C*, 7 Exch. 707; *Crouch* v. *The London and North Western R. C.*, 7 Exch. 705; *Chippendale* v. *The Lancashire and Yorkshire R. C.*, 21 L. J., Q. B., 22; *Slim* v. *The Great Northern R. C.*, 14 C. B. 647; *Hughes* v. *The Great Western R. C.*, 14 C. B. 637; *Walker* v. *The York and North Midland R. C.*, 2 E. & B. 750; *The York, Newcastle and Berwick R. C.* v. *Crisp*, 14 C. B. 527.

a parcel for carriage to a point beyond that to which their own means of conveyance extend, the question whether they are liable or not for its loss in transitu to that point from their own terminus, will depend upon the *nature of the contract for conveyance* actually entered into—was it a contract to carry the parcel, or to cause it to be carried to its final destination, or was it a contract to carry as far as their own line may extend, and then to transfer the goods to another carrier (*u*)? It is clear, that, where such a company undertakes to convey the customer's goods for an entire journey or transit, the company will be liable for a loss of the goods occasioned *during the transit* by the neglect of any person other than themselves who may at the time of the loss, *in point of fact*, be carrying them (*x*). Cases such as have been just cited, must now be examined in connection more particularly with the 2nd and 7th sections of the Railway and Canal Traffic Act.

Questions, further, of more or less difficulty, may sometimes arise as to whether the goods alleged to have been lost or injured were at the time of the loss or injury sustained in the custody of the company *as carriers* (*y*); whether the goods were delivered by the consignor in accordance with or in violation of the known course of business of the company (*z*); whether the goods were accepted or dealt with on behalf of the company by its servant or agent duly constituted and acting within the scope of his powers (*a*); but it may safely be laid down as

(*u*) *Fowles* v. *The Great Western R. C.*, 7 Exch. 699. See *Muschamp* v. *The Manchester and Preston R. C.*, 8 M. & W. 421; *S. C.* 2 Rail. Cas. 607.

(*x*) *Scothorn* v. *The South Staffordshire R. C.*, 8 Exch. 341.

(*y*) See *Giles* v. *The Taff Vale R. C.*, 2 E. & B. 822.

(*z*) *Slim* v. *The Great Northern R. C.*, 14 C. B. 647.

(*a*) See *Giles* v. *The Taff Vale*

a proposition, holding generally true, that when once a railway company "have held themselves out to be common carriers, there is engrafted upon their acceptance of the goods to be carried a common law liability to *carry* to all places to which they profess to carry, *even if one of those places should be beyond the confines of the realm*" (*b*). So also "they must equally take upon themselves the other part of the common law liability of carriers, viz. an obligation to *accept* all goods which are reasonably offered to them for conveyance to and from the places to which they profess to carry, *whether one of those places be without the realm or not*" (*b*).

Again, where a passenger travelling by railway takes with him an amount of *luggage* (*c*) not exceeding that which he is allowed to take under the bye-laws (*d*) of the company without being subjected to the payment of any extra charge, the sum paid by way of fare must be considered as paid *on account of the luggage as well as for his own conveyance;* so that the company will not, in respect of the luggage, stand on the footing of mandataries or gratuitous bailees for the benefit of the bailor, and be bound therefore to use only a slight degree of diligence, but they will be liable for loss of the luggage in their capacity of carriers, and such liability will have to be determined at

R. C., supra; *Roe* v. *The Birkenhead &c. R. C.*, 7 Exch. 36.

(*b*) *Crouch* v. *The London and North Western R. C.*, 14 C. B. 255, 290.

(*c*) Which term "comprises clothing and such articles as a traveller usually carries with him for his personal convenience:" Per *Parke*, B., *The Great Northern R. C.* v. *Shepherd*, 8 Exch. 38, which case also shews that the company will not, in the absence of notice, be responsible for the loss of merchandise packed in the luggage.

(*d*) See *The Great Northern R. C.* v. *Shepherd*, 8 Exch. 30.

common law (*e*); or by reference to the provisions of the Carriers Act; or by looking at the terms of any special contract bearing upon the point in question, which may have been entered into; and lastly, if need be, at the bye-laws of the company (*f*). In the case most likely perhaps to occur, *i. e.* where the passenger has delivered his luggage to one of the servants of the company with a view to its being labelled and placed in the luggage van for the purpose of conveyance, the company will, in the event of a subsequent loss of the luggage, clearly at common law be responsible for it (*g*). And the action, being here founded on the breach of duty—not on contract—will lie at suit of a servant whose fare was paid by his master, with whom he was travelling when the loss occurred (*h*).

Lastly, it may be noticed, that land-carriers usually undertake, expressly or impliedly, to *deliver* goods, and cannot be said to have fulfilled their contract to carry without delivery (*i*). "The duty of common carriers," remarks *Wilde*, C. J. (*k*), "by the common law is perfectly well understood; it is a warranty safely and securely to carry; whether they be guilty of negligence or not is immaterial; the warranty is broken by the non-conveyance or non-delivery of the goods intrusted to them." Where, moreover, the company are in the habit of delivering the passengers' luggage at the

(*e*) Story Bailm., 5th edit., p. 525.

(*f*) See, *Williams* v. *The Great Western R. C.*, 10 Exch. 15, (where a bye-law unduly restricting the liability of the defendants was held bad): *The Great Western R. C.* v. *Goodman*, 12 C. B. 313.

(*g*) *The Great Western R. C.* v. *Goodman*, supra.

(*h*) *Marshall* v. *The York, Newcastle, and Berwick R. C.*, 11 C. B. 655.

(*i*) Per *Cresswell*, J., 7 C. B. 859.

(*k*) 7 C. B. 858.

As to the liability of the purchaser and consignee to accept goods deteriorated in transitu, see *Bull* v. *Robison*, 10 Exch. 342.

end of the journey in a particular manner, with a view to their (the passengers') convenience—as by employing porters to carry it across the platform to the vehicles by which it is to be taken away—the company's liability as carriers will continue until the porters have so discharged their duty (*l*), in the absence of proof of any agreement by the plaintiff to accept a delivery of his luggage short of the ordinary delivery, and in the absence also of proof that the porter was deputed or specially employed by the plaintiff to convey the luggage to the carriage (*m*).

Torts by third persons to chattels under bailment.

Such being a brief view of the liabilities of common carriers of goods by our law, and more especially of railway companies when acting in that capacity (*n*), it yet remains

(*l*) *Richards* v. *The London, Brighton, and South Coast R. C.*, 7 C. B. 839.

(*m*) *Butcher* v. *The London and South Western R. C.*, 16 C. B. 13, where the following facts appeared in evidence:—The plaintiff, a passenger by railway, brought with him into the carriage a carpet bag, containing money, and kept it in his own possession until the arrival of the train at the London terminus. On alighting from the carriage with the bag in his hand, the plaintiff permitted a porter of the Company to take it from him, for the purpose of securing for him a cab; the porter having found a cab within the Company's station, placed the carpet bag on the foot-board thereof, and then returned to the platform to get some other luggage belonging to the plaintiff, when the cab disappeared, and the carpet bag and its contents were lost; the Company upon these facts were held liable.

(*n*) Although it would be irrelevant to the plan and subject matter of the present section, to inquire respecting the liabilities attaching to Railway Companies as passenger carriers, the reader may properly be referred for a view of the law upon this subject, to Story Bailm., 5th edit., pp. 608—623; *The Great Northern R. C.* v. *Hawcroft*, 21 L. J., Q. B, 178; *Hutchinson* v. *The York, Newcastle, and Berwick R.C.*, 6 Rail. Cas. 580; *Benett* v. *The Peninsular and Oriental Steam Boat Co.*, 6 C. B. 775; *Perren* v. *The Monmouthshire R & C. C.* (C. P.), 17 Jur. 532; *S. C.* 11 C. B 855; *The Great Northern R. C.* v. *Harrison*, 10 Exch. 376; and cases cited ante, p. 695, n. (*h*).

to notice that particular subdivision of torts to personalty which comprises cases wherein a tortious act is done by a third party to goods whilst under bailment and out of the possession of their owner. Now, in very many cases, an action may be maintainable in respect of such wrongful act, either by the general owner of the goods in question or by the special owner intrusted therewith (*o*). Thus, a carrier may maintain trover against a stranger who takes the goods out of his possession (*p*); and so may a factor (*q*), a warehouse-keeper (*r*), or an auctioneer (*s*); and a trustee (*t*), pawnee (*u*), licensee (*v*), or gratuitous bailee (*x*), may respectively sue for a tort to the chattel held in trust or on bailment; and, in any such case as above specified, the owner of the goods might, it is conceived, under ordinary circumstances, also sue.

It is, moreover, as remarked by *Parke*, B. (*y*), "an ancient rule of law, that, if goods are taken from the bailee, either the bailor or bailee may maintain trespass and recover damages for the taking." So, a mere gratuitous permission

(*o*) Per Lord *Loughborough*, C. J, 1 H. Bl. 85; Per *Lawrence*, J., 8 T. R. 334; Per *Grose*, J., 7 T. R. 12; 2 Wms. Saund 47 e.

(*p*) Per Lord *Ellenborough*, C, J., *Martini* v. *Coles*, 1 M & S. 147; *Arnold* v. *Jefferson*, 1 Ld. Raym. 275, 276; 1 Roll. Abr. 4 (1.), pl. 1.

(*q*) *Williams* v. *Millington*, 1 H. Bl. 85.

(*r*) Per Lord *Ellenborough*, C. J., 1 M. & S. 147.

(*s*) *Williams* v. *Millington*, 1 H. Bl. 81, 84; *Robinson* v. *Rutter*, 24 L. J., Q. B, 250.

(*t*) 2 Wms. Saund. 47 b, n.

(*u*) Com. Dig. "Trespass," (B. 4).

(*v*) *Northam* v. *Bowden*, 24 L. J., Exch., 237.

(*x*) *Rooth* v. *Wilson*, 1 B. & Ald. 59; *Nicholls* v. *Bastard*, 2 Cr. M. & R. 659; cited arg, *Howorth* v. *Tollemache*, 5 Scott N. R. 332.

(*y*) *Reg.* v. *Vincent*, 21 L. J., M. C., 109, 111, citing 2 Roll. Abr. "Trespass," 551; *Davis* v. *Danks*, 3 Exch. 435.

The right of a depositary to sue in trespass or trover is fully considered in Story Bailm., 5th edit., pp. 105, 124.

to a third person to use a chattel, does not, in legal contemplation, take it out of the possession of the owner; and accordingly either the owner may maintain trespass for an injury done to it whilst so used (*z*), or the gratuitous bailee may sue (*a*). And where there is an injury to the reversion, as in the case of a horse let on hire, and killed by defendant's violent driving, although trespass lies at suit of the party in possession, the owner may have an action on the case for the injury to his reversion (*b*).

Trover, however, being founded on the right, as well to the possession of, as to the property in, goods (*c*), will not in general lie, at suit of the owner, for chattels which have been let to hire or demised for an unexpired term (*d*); although there are cases shewing, that, where goods are bailed and the bailment is determined by the tortious act of the bailee—as by selling the goods—the property therein reverts at once to the bailor, so that he will be entitled to recover the goods or their value in trover, even from a bonâ fide purchaser (*e*), otherwise than in market overt.

It does not seem necessary here any further to advert to

(*z*) *Lotan* v. *Cross*, 2 Camp. 464.

(*a*) *Rooth* v. *Wilson*, 1 B. & Ald. 59.

(*b*) *Hall* v. *Pickard*, 3 Camp. 187; *Ferguson* v. *Cristall*, 5 Bing. 305. See *Harrison* v. *Parker*, 6 East, 154; *Lade* v. *Shepherd*, 2 Str. 1004.

(*c*) Ante, p. 154. See *Northam* v. *Bowden*, 24 L. J., Exch., 237.

Trover will not lie for fixtures whilst attached to the freehold, ante, p. 127, n. (*f*); *Wilde* v. *Waters*, 16 C. B 637.

(*d*) *Gordon* v. *Harper*, 7 T. R. 9; *Bloxam* v. *Sanders*, 4 B. & C. 941; *Milgate* v. *Kebble*, 3 Scott N. R. 358; *Pain* v. *Whittaker*, 1 R. & M. 99. See *Farrant* v. *Thompson*, 5 B. & Ald. 826, 828.

(*e*) *Bryant* v. *Wardell*, 2 Exch. 479, 482, following *Cooper* v. *Willomatt*, 1 C. B. 672; *Fenn* v. *Bittleston*, 7 Exch. 152.

torts committed to chattel property out of the actual possession of its owner; and on the assumption that enough has been said in the present section to indicate a classification, characterised by simplicity and practical utility, of Wrongs to Personalty, I will proceed, in the ensuing chapter, to inquire as to another leading class of Torts, differing somewhat materially from either of those classes which have hitherto been noticed.

CHAPTER IV.

OF TORTS—NOT DIRECTLY AFFECTING THE PERSON OR PROPERTY.

THUS far in the present Book I have spoken merely of Torts to the Person and to Property:—under the former title being included bodily injuries, whether direct or consequential, injuries to the health or comfort of an individual, wrongs which affect personal liberty; under the latter of the two heads just specified being comprised torts to realty, —whether in possession or reversion—and to chattels. There is yet a third class of torts demanding notice, within which arrange themselves such wrongs as do not directly affect either the person or the property of the party injured. True it is, that, in some sense, almost any wrongful act which could be named may be said to operate injuriously either on the person or on the property of him aggrieved; but, nevertheless, an intelligible line may be drawn between cases wherein it so operates *directly*, and those in which it so operates *indirectly*. For instance, if A. is induced to take B. into his service, in consequence of a false character respecting him fraudulently communicated by C., and B. afterwards is guilty of the crime of embezzling his master's property, it cannot be said that A. is directly—though he certainly is indirectly—damaged by the fraud of C.; such a case would obviously bring itself within that third and last class of torts, as to which I now propose very briefly to inquire.

Torts to ab- It consists of two kinds or species of wrongs, which are

clearly distinguishable from each other,—wrongs done to the *absolute* and wrongs done to the *relative* rights of individuals. The instance just given would serve to exemplify the former of these two subdivisions of the subject. The principle of the particular case specified falls indeed within the general proposition mentioned at a former page (*a*), that if A. fraudulently makes a representation which is false, and which he knows to be false, to B., meaning that B. shall act upon it; and B., believing it to be true, does act upon it and thereby sustains damage, A. will be liable at suit of B. in an action on the case (*b*); for, although fraud without damage or damage without fraud may give no cause of action, yet "where these two do concur," "there an action lieth" (*c*). "A mere lie," indeed, "thrown out at random without any intention of hurting anybody, but which some person was foolish enough to act upon," will not support an action of deceit, "for the *quo animo* is a great part of the gist of the action" (*d*).

solute or relative rights.

In connection with torts involving misrepresentation and fraud, the doctrine of *estoppel in pais* is very frequently brought into operation. The rule applicable in such cases has been thus laid down (*e*),—"that where one, by his

Estoppel in pais.

(*a*) Ante, p. 348.

(*b*) See *Milne* v. *Marwood*, 15 C. B. 778; Judgm., *Tancred* v. *Leyland*, 16 Q. B. 679.

(*c*) Per *Croke*, J., 3 Bul. 95; cited per *Buller*, J., *Pasley* v. *Freeman*, 3 T. R. 56; *The Imperial Gas Light &c. Co.* v. *The London Gas Light Co.*, 10 Exch. 39.

(*d*) Per *Ashhurst*, J., 3 T. R. 63.

(*e*) Judgm. *Pickard* v. *Sears*, 6 Ad. & E. 474, cited Judgm. *Nickells* v. *Atherstone*, 10 Q. B. 949. In *Gregg* v. *Wells*, 10 Ad. & E. 97--8, Lord *Denman*, C. J., lays down the rule even more broadly, in these words, that "a party who *negligently* or *culpably* stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving."

words or conduct, *wilfully* (*f*) causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." This doctrine, however, which has sometimes perhaps been carried too far (*g*), should cautiously be restricted within its legitimate limits as above defined; for what is termed an estoppel by act or representation, has the effect of concluding the party who did the act or made the representation, and of shutting out the truth: it is therefore "odious," and must be strictly made out (*h*).

To the class of torts to the absolute rights of individuals —though not directly affecting the person or property—are

(*f*) By the term 'wilfully' here used, "we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he *means* his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct, by negligence or omission, where there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect:" Judgm. *Freeman* v. *Cooke*, 2 Exch. 663 (which is a leading case, with reference to the doctrine of estoppel in pais); Per *Crompton*, J., *Howard* v. *Hudson*, 2 E. & B. 13. See further as to the above doctrine, 2 Smith L. C. p. 457-8, et seq.; *Cannam* v. *Farmer*, 3 Exch. 698, cited ante, p. 463; *Fairhurst* v. *The Liverpool Adelphi Loan Ass.*, 9 Exch. 422, cited ante, p. 600; *Waller* v. *Drakeford*, 1 E. & B. 749, cited ante, p. 155; Per *Maule*, J., *Blyth* v. *Dennett*, 13 C. B. 181; *Morgan* v. *Couchman*, 14 C. B. 100; *Price* v. *Groom*, 2 Exch. 542; Per Sir *J. Romilly*, M. R., *Money* v. *Jorden*, 15 Beav. 377; *Foster* v. *The Mentor Life Ass. Co.*, 3 E. & B. 48, 64, 66, 75, 79.

(*g*) See per *Jervis*, C. J., *Lewis* v. *Clifton*, 14 C. B. 254.

(*h*) Per Lord *Campbell*, C. J., *Howard* v. *Hudson*, 2 E. & B. 10.

referable a vast variety of cases, whereof many, especially such as involve fraud or malice, have been already sufficiently discussed (*i*). It is indeed generally true, that as injuries are multiplied, so must new remedies be devised to meet them,—as torts of a kind previously unknown spring into existence, so must the flexible power of law exert itself to compensate the injured party,—to mulct and punish the wrongdoer. The leading rule here applicable being, that where a case is new in its *principle*, there it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new in the *instance*, and the sole question is upon the application of a principle recognised in the law to such new case, it will be just as competent to Courts of justice to apply the principle to any case which may arise two centuries hence as it was two centuries ago. If it were not, we ought to blot out of our law books one fourth part of the cases that are to be found in them (*k*).

Torts belonging to the class here more particularly under our notice being thus multifarious, to the instances already given of them I will merely add, that negligence, when productive of damage, is clearly actionable; and where an attorney has been proved guilty of crassa negligentia (*l*) in the management of business confided to him, he will at

(*i*) Ante, pp. 292, 341, 680, 685, 738, et seq. See *Canham* v. *Barry*, 15 C. B. 597.

(*k*) Per *Buller*, J., 3 T. R. 63.

(*l*) *Purves* v. *Landell*, 12 Cl. & F. 91; *Parker* v. *Rolls*, 14 C. B 691; *Lewis* v. *Collard*, Id. 208; *Hunter* v *Caldwell*, 10 Q. B. 69; Per *Taunton*, J, *Doorman* v. *Jenkins*, 2 Ad. & E. 256; *Watts* v. *Porter*, 3 E. & B 743; *Cooper* v. *Stephenson*, 22 L. J., Q. B., 292; *Hawkins* v. *Harwood*, 4 Exch. 503; Per *Tindal*, C. J., *Godefroy* v. *Dalton*, 6 Bing. 467-8. See *North Western R. C.* v. *Sharp*, 10 Exch. 451; Broom's Prac., vol. 1, pp. 106—111.

all events be liable to nominal damages at suit of his client, the action being here founded upon a breach of contract or neglect of a duty which the law imposes (*m*).

In connection with this part of the subject, we must further bear in mind, that a master is civilly responsible as well for the fraud as for the negligence of his servant whilst acting in the course of his employment (*n*), albeit he is not thus liable for the tortious act of his agent in any matter beyond the scope of his agency, unless he has expressly authorised the act in question to be done or has subsequently adopted it for his own use and benefit (*o*).

Dismissing with these brief remarks the important and comprehensive class of wrongs done to absolute rights, let us, in the next place, consider what is meant by torts affecting the *relative* rights of individuals. *Relative* rights are such "as are incident to persons considered as members of society, and connected to each other by various ties and relations" (*p*). Torts to such rights include, therefore, injuries done to persons under the four following relations:—of husband and wife; of parent and child; of guardian and ward (*q*); of master and servant.

Torts to relative rights.

Husband and wife.

For the abduction of the wife—for an assault committed upon her *per quod consortium amisit*—for criminal conversation with her, the husband is allowed a civil remedy by our law. Of a declaration for the first of these three

(*m*) Per *Tindal*, C. J., *Godefroy* v. *Jay*, 7 Bing. 419.

(*n*) Ante, pp. 696, et seq. See *Steel* v. *The South Eastern R. C.*, 16 C. B. 550; *Ranger* v. *The Great Western R. C.*, 4 H. L. Cas. 72.

(*o*) *Coleman* v. *Riches*, 16 C. B. 104; Story on Agency, 4th edit., p. 622.

(*p*) 3 Bla. Com. p. 138.

(*q*) For full information respecting the relation of guardian and ward, the reader is referred to Mr. Warren's Abridgm. of Blackstone, Chap. 33; Kent, Com., 7th. edit., vol. 2, p. 225.

causes of action, which is not of very common occurrence, a precedent offers itself in *Norris* v. *Seed* (*r*), where the plaintiff sued in trespass for assaulting, ill-treating, and carrying away his wife, whereby he was deprived of her company and assistance. "The gist of the action," observed *Parke*, B., in this case, "being the loss of the comfort and society, an assault which did not end in the loss to the plaintiff of the comfort and society of his wife would not support an action. It is only such an assault and conduct on the part of the defendant as deprives the plaintiff of the power of associating with his wife as would support the action," i. e. as would support an action brought at suit of the husband to recover for the special damage sustained by him. If, indeed, the wife be assaulted, maliciously prosecuted, illegally imprisoned, or otherwise personally injured (*s*) by a third party, our law in general (*t*) gives an appropriate remedy to recover damages in the names of the husband and wife jointly; whereas, if the beating be so great or the injury sustained by the wife be such that the husband can allege and prove that thereby *consortium amisit*, he will be entitled to a separate remedy against the wrongdoer in his own name (*u*). And now the 40th section (*x*) of the 1st Com. L. Proc. Act provides, that, in any action brought by a man and his wife for an injury done to the wife, in respect of which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right.

(*r*) 3 Exch. 782; *Young* v. *Pridd*, Cro. Car. 89.

(*s*) See *Smith* v. *Hixon*, 2 Str 997; *Dalby* v. *Dorthall*, Cro. Car. 553.

(*t*) See *Longmead* v. *Holliday*, 6 Exch. 761, cited ante, p. 683.

(*u*) 3 Bla. Com. 140; *Hyde* v *Scyssor*, Cro. Jac. 538.

(*x*) Cited ante, p. 155.

"Adultery or criminal conversation with a man's wife, though it is, as a public crime, left by our laws to the coercion of the Spiritual Courts (*y*), yet, considered as a civil injury (and surely there can be no greater), the law gives a satisfaction to the husband for it by action" (*z*), which, as remarked by Lord *Abinger*, C. B. (*a*), may be framed in trespass or case indiscriminately, on the ground that the party aggrieved may waive all damages resulting from the trespass. In such action (to sustain which evidence of a valid marriage must be given (*b*)), the damages recovered are usually very large and exemplary. But these are properly increased and diminished by circumstances, as, the rank and station of the plaintiff and defendant, the relation or connection between them (*c*), the negligence or improper conduct of the husband (*d*), the seduction or otherwise of the wife, "her previous behaviour and character, and the husband's obligation, by settlement or otherwise, to provide for those children which he cannot but suspect to be spurious" (*e*).

Parent and child.

The foundation of the action at suit of a parent for seduction of his child has been uniformly placed, from the earliest times, not upon the seduction itself, which is the wrongful act of the defendant, but upon the *loss of service* of the daughter, in which service the parent is supposed to

(*y*) See Macqueen H. & W., Pt. 2, Chap. 4.

(*z*) 3 Bla Com. p. 139.

(*a*) *Chamberlain* v. *Hazlewood*, 5 M & W. 517.

(*b*) *Cutherwood* v. *Caslon*, 13 M. & W. 261. See *Harvey* v. *Watson*, 7 M & Gr. 644

(*c*) See 3 Bla. Com. p 140; 1 Selw. N. P., 10th edit., p. 23; Rosc. Ev. N. P., 8th edit, p. 534.

(*d*) Leg. Max., 2nd edit., p. 202, and cases there cited. As to the effect of condonation by the husband on his right of action against the adulterer, see Id. ibid.

(*e*) 3 Bla. Com. p 140. See Sedgw Damages, 2nd edit., pp. 544, 547

have a legal right or interest. It has, therefore, always been held, that some loss of service must be alleged in the declaration and proved at the trial, in order that the plaintiff may be legally entitled to redress (*f*). It cannot be denied that this state of the law occasionally operates most harshly; for where it appears in evidence that the plaintiff's daughter was, at the time of the occurrence complained of, in the service of another, without any animus revertendi, although that other were the seducer himself, the action will not be maintainable (*g*). Aware of the hardship and lack of justice thus entailed, and with a view to averting it, when that may be done consistently with acknowledged legal principles, our Courts grasp willingly at any, the slightest, proofs of loss of service which may be adduced to support a declaration framed for the injury alluded to, and to establish the existence of the relation of master and servant as between the parent and child, upon which the maintenance of the action for seduction, in truth, depends (*h*). Assuming, however, that this foundation for the action is laid, the plaintiff is permitted in it to recover damages ultra the mere loss of service for the injury inflicted on him (*i*).

(*f*) *Grinnell* v. *Wells*, 7 M. & Gr. 1033, 1041, and cases there cited; *Eager* v. *Grimwood*, 1 Exch. 61.

(*g*) *Blaymire* v. *Haley*, 6 M. & W. 55; *Davies* v. *Williams*, 10 Q. B. 725; *Harris* v. *Butler*, 2 M. & W. 539; Per *Parke*, B., Id., 542 (explaining *Speight* v. *Oliviera*, 2 Stark. N. P. C. 493); *Dean* v. *Peel*, 5 East, 45.

(*h*) *Griffiths* v. *Teetgen*, 15 C. B 344, following *Speight* v. *Oliviera*, supra; *Bennett* v. *Allcott*, 2 T. R. 166; *Torrence* v. *Gibbins*, 5 Q. B. 297; *Holloway* v. *Abell*, 7 Car. & P. 528.

(*i*) Per Lord *Ellenborough*, C. J., *Irwin* v. *Dearman*, 11 East, 24; Per Lord *Abinger*, C. B., *Howard* v. *Crowther*, 8 M. & W. 603.

Master and servant

Precisely on the same footing with the right of action for seduction stands that brought by a parent for a personal injury to his child (*k*)—or by a master for the battery of his servant—*per quod servitium amisit.* "It is the invasion of the legal right of the master to the services of his servant that gives him the right of action for beating his servant"(*k*). And "if," as we further read in *Robert Marys's case* (*l*), "my servant is beat, the master shall not have an action for this battery *unless* the battery is so great, that, by reason thereof, he loses the service of his servant, but the servant himself, for every small battery, shall have an action; and the reason of the difference is, that the master has not any damage by the personal beating of his servant," but by reason only of its consequences, viz. the loss of service; "for be the battery greater or less, if the master doth not lose the service of his servant, he shall not have an action" (*m*).

Another species of injury incident to the relation between master and servant may here properly be noticed. It consists in the wrongfully and maliciously or *with notice* interrupting this relation, by procuring the servant to depart

(*k*) Per *Tindal*, C. J., 7 M. & Gr. 1041, (citing *Russell* v. *Corne*, 2 Ld. Raym. 1081, and *Gray* v. *Jefferies*, Cro. Eliz. 55); *Hall* v. *Hollander*, 4 B. & C. 633; *Dixon* v. *Bell*, 5 M. & S. 198. See *Newton* v. *Holford*, 6 Q. B 921.

As to trespass for the abduction of a child, see 3 Bla. Com. p. 141; *Barham* v. *Dennis*, Cro. Eliz. 769, (cited 4 B. & C. 662); Aig. 5 M. & W. 516; *Gilbert* v. *Schwenck*, 14 M. & W. 488; *Lumley* v. *Gye*, 2 E. & B 250, 257.

(*l*) 9 Rep. 113 a, cited Judgm., 3 C. B. 91-2; *Martinez* v. *Gerber*, 3 M. & Gr. 88.

(*m*) As to the measure of damages in the action by a master founded on loss of service, see per Lord *Tenterden*, C J., *Hall* v. *Hollander*, 4 B & C. 663; *Hodsoll* v. *Stallebrass*, 11 Ad. & E 301.

from the master's service or by harbouring and keeping him as servant after he has quitted it, and during the time stipulated for as the period of service, whereby the master is injured. Whoever thus entices away the servant of another commits a wrongful act, for which he is responsible at law(*n*). Nor does the principle here stated seem to be limited in its applicability to the case of menial servants, to which the Statute of Labourers (25 Edw. 3, st. 1) relates. It has been held to extend to the case of persons who have contracted for personal service for a time, and who, during such period, have been wrongfully procured and incited to abandon such service, to the loss of the persons whom they had contracted to serve(*o*). For this injury, the remedy is by a special action on the case against the wrongdoer, though the master may also have an action against the servant for non-performance of his agreement (*p*).

(*n*) Per *Crompton*, J., *Lumley* v. *Gye*, 2 E. & B. 224; Per Lord *Kenyon*, C. J., *Nichol* v. *Martyn*, 2 Esp. 734.

(*o*) Per *Wightman*, J., 2 E. & B. 240.

(*p*) 3 Bla. Com. p. 142.

As to the measure of damages in an action for enticing away the servant of another, see *Gunter* v. *Astor*, 4 Moore, 12.

CHAPTER V.

ON THE MEASURE OF DAMAGES—IN ACTIONS OF TORT.

THE damages recoverable in an action ex delicto are in general regarded by our law as purely *compensatory*, although a wider latitude is necessarily allowed to the jury assessing them than in actions of contract. The general principle here stated may be illustrated by the following cases:—In trespass, for cutting into the plaintiff's close and carrying away his soil, the plaintiff is entitled, by way of compensation, to what the land was worth to him (*a*). In trover, the damages are ordinarily to be measured by the value of the thing converted (*b*); though where the plaintiffs sued in trover for a bill of exchange for 1600*l.*, deposited by them with the defendant, and it appeared that the defendant had been guilty of a conversion of the bill, and had afterwards raised 800*l.* by discounting it, the plaintiffs were held entitled to a verdict for 1600*l.*; for the defendant "converted the whole bill, and the plaintiffs are entitled to recover the value of the whole at the time of the conversion" (*c*). Again,—the value of a chattel sued for in trover may, in some cases, be properly estimated and determined by applying the legal maxim *omnia præsumuntur contra spoliatorem* (*d*). In case against the sheriff for taking an

(*a*) *Jones* v. *Gooday*, 8 M. & W 146. See *Thompson* v. *Pettitt*, 10 Q. B. 101.

(*b*) Per *Patteson*, J., *Finch* v. *Blount*, 7 Car. & P. 478, and in *Cook* v. *Hartle*, 8 Id. 568; *Reid* v. *Fairbanks*, 13 C. B. 692.

(*c*) *Alsager* v. *Close*, 10 M. & W. 576, 584.

(*d*) *Armory* v. *Delamirie*, 1 Str. 505; Leg. Max., 2nd ed., p. 725.

insufficient replevin bond, the reasonable measure of damages is the amount of rent distrained for, together with the expenses of the distress (*e*). In an action against the sheriff for an escape, the damages should be assessed by reference to "the value of the custody of the debtor at the moment of the escape," although, if the plaintiff has done anything to aggravate the loss occasioned by the sheriff's neglect, or has prevented him from retaking the debtor, the amount recoverable would be materially affected by such conduct (*f*). So, in an action against an attorney for negligence, damages should be awarded commensurate with the loss sustained (*g*).

It is, indeed, easy to suggest a state of facts giving rise to an action ex delicto, which would at once present the true measure of damages to be awarded to the complainant, and in which no ground for aggravated damages beyond such measure would exist. Thus, in case by a reversioner for injury to his reversionary freehold interest in land, the measure of damages would be ascertained by considering to what extent the land was lessened in value by the wrongful act of the defendant (*h*). In an action by a tenant against his landlord for selling goods under a lawful distress but without having them properly appraised, the measure of damages would be the real value of the goods sold, minus the rent due (*i*). And, generally, where an injury is done to land or goods, the compensation to be

(*e*) *Edmonds* v. *Challis*, 7 C. B. 413.

(*f*) *Arden* v. *Goodacre*, 11 C. B. 371, 375.

(*g*) *Watts* v. *Porter*, 3 E. & B. 743, 751.

(*h*) *Hosking* v. *Phillips*, 3 Exch. 168.

(*i*) *Knight* v. *Egerton*, 7 Exch. 407.

awarded should be proportioned to the amount of the plaintiff's interest therein (*k*).

But although, as remarked by Lord *Denman*, C. J. (*l*), "it is important to uphold the principle, that a plaintiff is entitled to recover by way of damages all that, at the commencement of the suit, he has lost through the wrongful act for which the defendant is sued," the rule here stated will often fail to guide us, with satisfactory certainty, to a determination of the measure of damages in tort. If, for example, in an action for a trespass to land and injury done by treading down the grass and herbage, the jury, in estimating damages, were to be restricted to exactly the amount of the injury sustained by the plaintiff, it would, in effect, be placing a wrongdoer, in many cases, upon precisely the same footing as one who enters with the owner's permission; for the lowest terms upon which the last-named party could have expected to obtain such permission would have been, that he should make compensation for the full amount of damage that might be done to the grass; in other words, it would be putting an unlicensed trespasser upon the same footing as one who entered with leave and license (*m*). So, in an action against the sheriff for wrongfully seizing the plaintiff's goods it was remarked by *Alderson*, B. (*n*), that juries have not much compassion for trespassers, and are not bound to "weigh in golden scales" how much injury a

(*k*) See *Twyman* v. *Knowles*, 13 C. B. 222; *Brierley* v. *Kendall*, 17 Q. B. 937; *Harvey* v. *Pocock*, 11 M. & W. 740; *Pritchard* v. *Long*, 9 M. & W. 666; *Badeley* v. *Vigurs*, 4 E. & B. 71; *Pell* v. *Shearman*, 10 Exch. 766; and cases cited Sedgw. Dams., 2nd edit., p. 139.

(*l*) *Rundle* v. *Little*, 6 Q. B. 178.

(*m*) Per *Maule*, J., *Williams* v. *Currie*, 1 C. B. 847, and cases there cited.

(*n*) *Lockley* v. *Pye*, 8 M. & W. 135. See *Gillard* v. *Brittan*, 8 M. & W. 575; *Warwick* v. *Foulkes*, 12 M. & W. 507.

party has sustained by a trespass. And, in actions for criminal conversation (*o*), for seduction (*p*), or for malicious injuries, juries have been allowed to give what are called *vindictive* damages, and to take all the circumstances into their consideration (*q*),—a remark which seems applicable also to any case in which the process of a Court of justice has been abused, and a gross outrage has been committed under the forms of law (*r*). Inasmuch, moreover, as it is the peculiar province of the jury to assess the damages, the Court will not grant a new trial on the ground that the amount awarded is insufficient (*s*) or excessive (*t*), unless they are satisfied that the jury either were actuated by some improper motive or proceeded upon a wrong principle in making their assessment, or unless the amount awarded is grossly disproportioned to the injury sustained (*u*); for the well-known maxim is, *ad quæstionem facti non respondent judices.*

Whether damages be regarded as "a compensation and satisfaction for some injury sustained" (*x*), or as in their

(*o*) *Duberley* v. *Gunning*, 4 T. R. 651; *Wilford* v. *Berkeley*, 1 Burr. 609.

(*p*) *Tullidge* v. *Wade*, 3 Wils. 18; ante, p. 846.

(*q*) Per *Pollock*, C. B., *Doe* v. *Filliter*, 13 M. & W. 51; Per Lord *Tenterden*, C. J., *Sears* v. *Lyons*, 2 Stark. N. P. C. 282; Per Lord *Ellenborough*, C. J., *Bracegirdle* v. *Orford*, 2 M. & S. 77; *Beardmore* v. *Carrington*, 2 Wils. 244.

(*r*) *Gregory* v. *Slowman*, 1 E. & B. 360, 370; *Duke of Brunswick* v. *Slowman*, 8 E. & B. 317.

(*s*) *Howard* v. *Barnard*, 11 C. B. 653; *Apps* v. *Day*, 14 C. B. 112; *Armytage* v. *Haley*, 4 Q. B. 917.

(*t*) *Creed* v. *Fisher*, 9 Exch. 472; *Chambers* v. *Caulfield*, 6 East, 244. See *Rolin* v. *Steward*, 14 C. B. 595; *Beardmore* v. *Carrington*, supra.

(*u*) See *Williams* v. *Currie*, 1 C. B. 841; *Chilton* v. *The London and Croydon R. C.* (Exch.), East. T., 1848, reported for another point, 16 M. & W. 212. And see the cases cited 2 Chitt. Arch. Prac., 8th edit., p. 1326.

(*x*) 2 Bla. Com. p. 438; ante, pp. 629, 850.

nature penal, so that they may, in certain cases, be given to punish or to deter, and not merely to compensate (*y*), the inquiry, how far a jury in assessing damages for a tort may properly take into account the motive and intention which actuated the wrongdoer, is one of much interest and importance. Now, it will at once strike us, that there are very many tortious acts which suffice to entitle an aggrieved party to damages, without any reference at all being had to the motive or intent which may have prompted them; whilst other cases will as readily suggest themselves, in which the animus, motive, or intention of the party charged constitutes an essential element in, if it be not the very gist and substance of, the charge alleged against him. It is clear, that, if a trespass be done to my land, or if my goods are illegally withheld from me, or if I sustain personal injury by reason of the negligence and want of due caution of another, I may maintain against him an action of trespass, trover, or on the case, to support which no evidence will be required of any malicious motive or wrongful intention on the part of the defendant. In trespass qu. cl. fr., the defendant pleaded that he had land adjoining plaintiff's close, and upon it a hedge of thorns; that he cut the thorns, and that they *ipso invito* fell upon the plaintiff's land, whereupon the defendant removed them thence as soon as possible. Upon demurrer to this plea, judgment was given for the plaintiff (*z*); for, in a civil action of this nature, "the intent is immaterial if the act done be injurious to another" (*a*).

Intention or motive of wrongdoer—whether material in estimating damages.

(*y*) Per Lord *Camden*, C. J., 2 Wils. 206, 207, 248; Per *Heath*, J., 5 Taunt. 444.

(*z*) *Lambert* v. *Bessey*, Sir T. Raym. 422; ante, p. 689.

(*a*) Per Lord *Kenyon*, C. J., *Haycraft* v. *Creasy*, 2 East, 104. See *Simmons* v. *Lillystone*, 8 Exch. 431; *Stead* v. *Anderson*, 4 C. B. 806.

We have already seen that an infant (*b*) or a lunatic (*c*) is civilly liable for his tortious act.

But, although an action ex delicto may sometimes, in strictness, be maintainable for an injury caused unintentionally during the prosecution of a lawful act (*d*), yet, in determining the amount of damages to be awarded to a complainant, a jury will, in general, doubtless look at all the circumstances accompanying the particular act complained of, and amongst them at the apparent animus of the defendant. It seems, indeed, just and right that they should do so, inasmuch as the amount of injury for which compensation is to be given will, in some cases, be most materially affected by the motive which prompted to its commission, or by the intention with which it was done. In an action of trespass, for instance, an insulting gesture accompanying an act which, though not attended with violence, amounts in law to an assault, may greatly augment the mental anxiety and *injury* caused thereby; and the offensive demeanor of a defendant, or the rank and social position of a plaintiff, may properly be taken into account in fixing the damages which, in such a case, should attend the verdict (*e*).

Again, wherever the gist of an action ex delicto is mala fides, fraud, or deceit, it is manifest that the motive or intention of the party charged with want of good faith or with deceit is a matter peculiarly and specially for investigation before a jury. Whether particular facts do or do not in any given case furnish evidence of fraud in law, may

(*b*) Ante, p. 595.
(*c*) Ante, p. 690.
(*d*) Ante, p. 689.
(*e*) See *Merest* v. *Harvey*, 5 Taunt. 442; *Price* v. *Severn*, 7 Bing. 316, 319; Per *Bosanquet*, J., *James* v. *Campbell*, 5 Car. & P. 372.

indeed depend upon the wording of an Act of Parliament (*f*), or may have to be determined by applying one or other of those rules laid down in former pages (*g*) of this work, whereby our law sometimes judges of and ascertains the intention. Cases of the kind alluded to, however, alike serve to illustrate and sustain the proposition, that, in an action ex delicto, our law does not seldom regard as most material the intent and animus of the defendant.

Lastly, in connection with this inquiry, it will not be controverted, that, in very many rights of action founded upon tort, not involving malice or deceit, the intention wherewith an act was done and which gives to such act a colour and a meaning, is, like any other fact, to be determined by the jury. Let us suppose, for instance, that an action of trover or detinue is brought for a bill of exchange, and the defence be, that the bill was handed over to the defendant *as a gift*, the intention with which it was transferred to him would necessarily become at the trial the main, if not the sole, subject of inquiry; for a bill of exchange being a chattel, the gift would become complete "by delivery, coupled with the *intention to give*" (*h*). "To pass the property in a chattel," says *Alderson*, B. (*i*), "there must be both a gift and a delivery;" so that, where A. had possession of certain silver plate belonging to B., and B. said to A., "I will give you all the plate that is mine," but no actual delivery of the plate ever took place, the words used were

(*f*) See per Lord *Denman*, C. J., *Rouch* v. *The Great Western R. C.*, 1 Q. B. 60—61; Per *Park*, J., *Rawson* v. *Haigh*, 2 Bing. 104; *Thoyts* v. *Hobbs*, 7 Exch. 810. See *Hutton* v. *Cruttwell*, 1 E. & B. 15; *Young* v. *Waud*, 8 Exch 221, and cases there cited.

(*g*) Ante, pp. 346, 738, 749.

(*h*) Per *Parke*, B., *Milnes* v. *Dawson*, 5 Exch. 948.

(*i*) 4 Exch. 479; ante, pp. 438, 439

held to admit of their literal signification merely, and to be indicative of a bare intention to give at some future time (*k*). So, again, wherever the *animus revertendi* or the *animus cancellandi* has to be inquired into, we have additional instances illustrative of what has just been said. Whenever, indeed, the intention with which an act was done becomes material, the jury will have to decide upon it; subject, of course, to the effect of such legal presumptions as may, under the circumstances of the case, apply. On a recent occasion (*l*), *Williams*, J., is reported to have said, that "no question of the intention of parties *can* be a question of law."

Damages—general or special.

Damages are either *general* or *special*. 'General' damages are such as the law implies or presumes to have accrued from the wrong complained of (*m*). 'Special' damages are such as really took place, and are not implied by law: they are either superadded to general damages arising from an act injurious in itself, or are such as arise from an act indifferent and not actionable in itself, but injurious only in its consequences (*n*). "It does not appear necessary to state the formal description of damages in the declaration, because presumptions of law are not in general to be pleaded or averred as facts" (*n*); and substantial damages may in some cases,—as in an action against a banker for not duly honouring a cheque or an acceptance of his cus-

(*k*) *Shower* v. *Pilck*, 4 Exch. 478.

(*l*) *Blyth* v. *Dennett*, 22 L. J., C. P., 79, 80; *S. C.*, 13 C. B. 178.

Subject to what has been above said as to the possible effect of certain legal presumptions, &c., the remark cited in the text would, it is apprehended, hold generally true.

(*m*) *Rochdale Canal Co.* v. *King*, 14 Q. B. 122; *Nicklin* v. *Williams*, 10 Exch. 259; and cases cited ante, pp. 84 et seq.; *Cotterill* v. *Hobby*, 4 B. & C. 465.

(*n*) 1 Chitt. Pl., 7th edit., p. 410.

tomer (*o*), or for slander of a person in the way of his trade (*p*),—be recovered, although special damage be neither alleged nor proved.

When, however, the law does not, as of course, imply that the plaintiff sustained damage by the act complained of, it is essential to the validity of the declaration that the resulting damage should be shewn with particularity (*q*). And when the damages sustained have not necessarily accrued from the act complained of, and consequently are not implied by law, then, in order to prevent the surprise on the defendant which might otherwise ensue on the trial, the plaintiff must in general state the particular damage which he has suffered, or he will not be permitted to give evidence of it (*r*).

Consequential damage recoverable, provided it be not too remote.

In an action of tort, then, damages consequential on the tortious act complained of may (provided they be not too remotely connected with it) be recovered (*s*). If, for instance, a sheriff wrongfully seizes goods which are afterwards taken from him by another wrongdoer, the owner of the goods may recover against the sheriff, as special damage, the amount necessarily paid to the second wrongdoer, in order to get back the goods (*t*). The decision in this

(*o*) *Rolin* v. *Steward*, 14 C. B. 595. See per Lord *Denman*, C. J., *Rogers* v. *Spence*, 13 M. & W. 581.

(*p*) Per *Williams*, J., 14 C. B. 607; ante, p. 762.

(*q*) 1 Chitt. Pl., 7th edit., p. 411. See, for instance, the form of declaration in *Martin* v. *The Great Northern R. C.*, 16 C. B. 179.

(*r*) 1 Chitt. Pl., 7th edit., p. 411. See *Richardson* v. *Chasen*, 10 Q. B. 756; *Thompson* v. *Wood*, 4 Q. B. 493.

(*s*) As exemplifying the above proposition, see *Foxhall* v. *Barnett*, 2 E. & B. 928; Per *Tindal*, C. J., *Corbett* v. *Brown*, 5 Car. & P. 363; *Ewbank* v. *Nutting*, 7 C. B. 797; *Bodley* v. *Reynolds*, 8 Q. B. 779; *Moon* v. *Raphael*, 2 Bing. N. C. 310; *Rowlands* v. *Samuel*, 11 Q. B. 39; *Tindall* v. *Bell*, 11 M. & W. 228.

(*t*) *Keene* v. *Dilke*, 4 Exch. 388. See *Barrow* v. *Arnaud*, 8 Q. B. 595.

case, indeed, may clearly be supported, without in any way referring to the legal doctrine as to remoteness of damage, inasmuch as the price paid by the plaintiff to recover possession of his goods from the third party might very fairly be taken by the jury as affording a true criterion of their value (*u*).

As regards the question, what damage is too remote to be recoverable in an action of tort? I must, to avoid repetition, here content myself with referring to the remarks made and cases cited at a former page (*v*), and to the substance of what has been previously said (*w*) touching remoteness of damage in actions ex contractu. The present state of our law, indeed, to be collected from decisions as yet reported upon this subject, precludes the possibility of propounding precise and definite rules respecting it; each case, raising a question as to the measure of damages ex delicto, being decided rather upon its own facts or by analogy to some special precedent, than in accordance with principle or even with an established course of practice. Not only would it be incompatible with the plan of this treatise to examine

(*u*) See, further, as to the criterion whereby to measure damages, *Sanquer* v. *The London and South Western R. C.*, 16 C. B. 163.

As to damages in trover or trespass for taking goods, see *Reid* v. *Fairbanks*, 13 C. B. 692; *Martin* v. *Porter*, 5 M. & W. 351; *Wood* v. *Morewood*, 3 Q. B. 440, n. See, also, *Morgan* v. *Powell*, Id. 278; *Hitchman* v. *Walton*, 4 M. & W. 409, 416; *Wild* v. *Holt*, 9 M. & W. 672; *Thompson* v. *Pettit*, 10 Q. B. 101; *Buckland* v. *Johnson*, 15 C. B. 145, cited ante, p. 806. As to damages in detinue, see ante, p. 122; *Crossfield* v. *Such*, 8 Exch. 159.

(*v*) Ante, pp. 93 et seq.; *Lumley* v. *Gyé*, cited ante, p. 94; *Haddan* v. *Lott*, 15 C. B. 411; *Milne* v. *Marwood*, 15 C. B. 778; *Flower* v. *Adam*, 2 Taunt. 314; *Powell* v. *Salisbury*, 2 Y. & J. 391.

In *Lock* v. *Ashton*, 12 Q. B. 871, one portion of the damages claimed was held not recoverable, inasmuch as it could not in law have flowed directly from the plaintiff's act. See also *Holloway* v. *Turner*, 6 Q B. 928.

(*w*) Ante, pp. 647—653.

minutely and seriatim the older cases which might be brought together, to exemplify the mode of assessing damages in an action of tort, but it would be superfluous so to do,—the task having already been adequately performed by another and an abler hand (*x*).

Having now classified rights of action ex delicto, and specified the ingredients therein, it may be well to inquire in what respects a tort differs from a contract and from a crime. A moment's reflection will suggest some important points of difference between a right of action upon contract and one upon tort. A contract is founded upon consent—it requires privity, more or less immediate, between the contracting parties, in reference to it; no inquiry is, in general, needed as to the motive or intention of the contractor when proved to have committed a breach of contract; the measure of damages ex contractu is, in most cases, more or less nearly determined by the stipulations of the parties. To constitute a right of action ex delicto, on the other hand, no privity is needed, nor of course do the parties consent ad idem, for a tort is inflicted without or against the consent of the party who sustains it. In tort, moreover, the measure of damages is, in general, by no means strictly limited, nor is it capable of being indicated with precision; a wide discretion is *there* allowed to the jury in determining the proper amount of compensation to be awarded, whilst, in so doing, many elements are properly deemed material which

(*x*) Mr. Sedgwick's learned treatise on the Measure of Damages, 2nd edit., is here alluded to, of which see particularly Chaps. 3—5, 18—22.

cannot affect the verdict in an action purely of contract. Besides the important differences thus briefly pointed out, a comparison of the introductory chapters herein contained having reference respectively to contracts and to torts, will shew, that rights of action, founded respectively thereupon, present to our view, when analysed, wholly dissimilar ingredients, and must therefore, apart from mere technical distinctions, be separately treated and considered.

But how, it may be asked, does a tort differ from a crime? To answer this question fully would, of course, necessitate the anticipation of what yet remains to be said in this volume. I would, however, observe, that a tort *mainly* (*y*) differs from a crime in this respect,—that the former is a violation of a *private* right, whereas the latter is a wrong done to the *public*.

What doubtless tends to introduce confusion and perplexity into the mind of one called upon to draw the distinctions now adverted to is, that sometimes out of the same facts may originate a right to sue in contract or in tort, or even a right to prefer a criminal indictment. Thus, a forcible entry upon land (*z*) or an assault is clearly indictable,—it will as clearly give to the injured party a remedy in trespass. A libeller may, in many cases, be proceeded against either by indictment or by action; the object of the first-mentioned remedy being to punish the offence committed against the public, for every libel has a tendency to cause a breach of the peace on the part of the person libelled,—the remedy by action being with a view to compensating in damages for the injury sustained (*a*). Cases

(*y*) See Mr Warren's Abridgment of Blackstone, p. 577.

(*z*) As to which, see 4 Bla Com p. 148; post, Chap. 2.

(*a*) 3 Bla. Com. p. 125.

might, moreover, easily be put, shewing that a transaction *may* involve a criminal, also a tortious element, and, lastly, a breach of contract; so that if the criminal element be disregarded, a valid right of action ex delicto is disclosed; and if the tortious ingredient be also rejected, a remedy ex contractu will remain to the complainant. Let us, for instance, suppose that a person fraudulently obtains goods under circumstances which would render him liable to be indicted for a misdemeanor by our law,—that he afterwards sells the goods and receives the proceeds of their sale,—here the individual who wrongfully possessed himself of the goods would be liable to an indictment for fraud or false pretences,—to trover at suit of the rightful owner for the conversion—or, lastly, to an action for money had and received, notice of the criminal or tortious ingredients in the particular transaction being waived.

Without attempting just now to enter further into the inquiry before us respecting the distinction between a tort, a contract, and a crime, the following brief view of the subject may be suggested: The wisdom of ages, says Mr. J. *Burrough*, has in England established and perfected a system of law called the common law; this law is adapted to the general regulation of the conduct of the subjects of the Crown as members of society; its principles, if accurately attended to, will be found all to point to that end (*b*):—our law, accordingly, sometimes allows the same state of facts to be regarded from totally different points of view (*c*); and yet, on each occasion of viewing and considering it, presents a remedy adapted to the requirements of society or of an individual, allowing the person aggrieved, within certain

(*b*) *Deane* v. *Clayton*, 7 Taunt. 496. (*c*) See also ante, p. 808.

limits and subject to certain restrictions, to select that particular mode of procedure which he prefers.

In every action ex delicto it will be found that some specific wrong or injury has been done, for which it is the object of the plaintiff to enforce compensation or to seek redress; and "since" (to use the words of Sir W. Blackstone (*d*)) "all wrong may be considered as merely a privation of right, the plain natural remedy for every species of wrong is the being put in possession of that right whereof the party injured is deprived;" this, under some circumstances, being effected by the re-delivery or restoration of the thing sued for to its legal owner,—in others, by making the sufferer a pecuniary satisfaction in damages for the injury sustained. As well, however, in the wrongful abstraction of property, as in a tortious act done to it or to its owner, ingredients may enter cognisable *solely* by our criminal law; and hence it is, that these Commentaries, which commenced with an examination of Legal Rights, and of the component elements of our common law, and have since been successively directed to the law of Contracts and of Torts, will properly terminate with an inquiry as to offences against society punishable as Crimes.

(*d*) 3 Com. p. 116.

BOOK IV.

OF CRIMINAL LAW.

IN this Book I propose, in the first place, to take an introductory view of some of the elementary principles of our criminal law; and afterwards, without attempting minutely to examine each of the offences falling properly under its cognisance(*a*), I will endeavour rather so to classify and arrange them, that the study of this department of jurisprudence, when pursued in detail by reference to other treatises, may be facilitated, and a foundation laid for its complete and enduring mastery.

CHAPTER I.

OF CRIMINAL LAW GENERALLY—ITS ELEMENTARY PRINCIPLES.

Importance of a knowledge of our criminal law.

Ignorance of law no excuse for infringing it.

THE extreme importance of a knowledge of our criminal law will be admitted by him who reflects, however cursorily, on the well-known maxim—"*Ignorantia juris quod quisque scire tenetur neminem excusat*,—a mistake in point of law, which every person of discretion not only may but is bound and presumed to know, affords, in criminal cases,

(*a*) Projected changes in our criminal law—long deferred, but now apparently imminent—render it undesirable to treat the subject of this Book otherwise than slightly.

no sort of defence (*b*); so that when an offender is arraigned at the bar of justice, a plea that he has mistaken the law, —however much, if proved, it might operate in mitigation of punishment,—is one which the Court would not be at liberty to entertain (*c*). "The law," as remarked by high authority, "is administered upon the principle, that every one must be taken conclusively to know it, without proof that he does know it" (*d*).

The law speaks imperatively.

But, further, our criminal law, whether common or dependent upon statute, is *imperative* with reference to the conduct of individuals; so that, as will immediately be seen (*e*), if a statute forbids or commands a thing to be done, all acts or omissions contrary to the prohibition or command of the statute, are offences at common law, and ordinarily indictable as such. In support of what has been just said, and as illustrating the rule, that, whenever the law positively forbids a thing to be done, it becomes thereupon ipso facto illegal to do it (*f*), may be mentioned *Reg.* v. *Woodrow* (*g*), where it was held, under a penal statute (5 & 6 Vict. c. 93, s. 3), that a dealer in tobacco, having in his possession adulterated tobacco, although ignorant of its adulteration, is liable to the penalties imposed by that Act. It may be conceded, indeed, that laws for the protection of the revenue are, in some respects, peculiar; yet the case cited seems clearly to illustrate the proposition above stated (*h*).

(*b*) 4 Bla. Com. p. 27.

(*c*) *Ex parte Barronet*, 1 Dearls. 51; *R.* v. *Esop*, 7 Car. & P. 456; *R.* v. *Bailey*, Russ. & Ry. 4.

(*d*) Per *Tindal*, C. J., delivering the opinion of the majority of the judges in *M'Naghten's case*, 10 Cl. & F. 210.

(*e*) Post, p. 867.

(*f*) Per *Ashhurst*, J., 4 T. R. 457.

(*g*) 15 M. & W. 404, and cases there cited.

(*h*) In support of which, see, also, *Lee* v. *Simpson*, 3 C. B. 871; *Re Humphreys*, 14 Q. B. 388; *R.* v. *Jones*, 2 B. & Ad. 611; post, p. 867.

The law, being thus imperative, cannot be called in question, nor be made to bend in accordance with the opinion or the will of those subjected to it. "There can be nothing more dangerous," it has been observed (*h*), "than to allow the obligation to obey a law to depend upon the opinion entertained by individuals of its propriety,—that opinion being so liable to be influenced by interest, prejudice, and passion."

And, again, it has been said (*i*), that "where any act is by law defined to be illegal and criminal, every one is punishable who voluntarily does the prohibited act without some legal justification or excuse, furnished by the occasion and circumstances, and without regard to his real motive and intention. To hold that a man should be absolved from penal responsibility merely because his motives were benevolent, would be to set private opinion above the law." Our criminal law is, then, to be made to bear alike and equally on all, and must be applied, in the great majority of cases, without paying heed to any excuse founded upon ignorance of its precepts or disapproval of its provisions. All subjects and foreigners (*k*) within the realm are alike bound to obey the law, for the law speaks to all *uno ore* (*l*).

Our law, whether written or unwritten, being thus stringent in its requirements, let us consider the consequences which follow on an infringement of its ordinances.

Meaning of word 'crime.'

The word '*crime*' is popularly understood as conveying the idea of something done *in violation of law* (*m*), and

(*h*) Per Lord *Campbell*, 9 Cl. & F. 324.

(*i*) Cr. L. Com., 6th Rep., p. 52.

(*k*) *Ex parte Barronet*, 1 Dearsl. 51; *R.* v. *Esop*, 7 Car. & P. 456. See, however, per Sir *W. Scott*, 1 Rob. Adm. R. 226.

(*l*) 2 Inst. 184.

(*m*) See Webst. Dict. or Johns. Dict., ad voc.

therefore, it may be presumed, exposing the 'criminal' in some sort to punishment.

A crime is an offence of a public nature.

Under the denomination of crimes are, by our law, comprised offences of a *public nature*, i. e. all such acts or attempts as tend to the *prejudice of the community* (*n*). "There can be no doubt," says Serjt. Hawkins (*o*), "but that all capital crimes whatsoever, and also all kinds of inferior crimes of a public nature, as *misprisions* (*p*), and all other contempts, all disturbances of the peace, all oppressions, and all other *misdemeanors* (*q*) whatsoever of a public evil example against the common law, may be indicted,—but no injuries of a private nature, unless they some way concern the king." "Also," he adds, "it seems to be a good general ground, that, wherever a statute prohibits a matter of public grievance to the liberties and security of a subject, or commands a matter of public convenience, as the repairing of the common streets of a town, an offender against such statute is punishable not only at the suit of the party aggrieved, but also by way of indictment for his contempt of the statute (*r*), unless such method of proceeding do manifestly appear to be excluded by it."

The case of *Rex* v. *Wheatley* (*s*) is useful for reference,

(*n*) See per *Lawrence*, J., 2 East, 21.

(*o*) Hawk. Pl. Cr., Bk. 2, Chap. 25, s. 4.

(*p*) 'Misprision' "properly signifieth neglect or contempt," but in law is applied more particularly "when one knoweth of any treason or felony, and concealeth it:" 2 Inst. 36. "The word 'misprision' in its larger sense is used to signify every considerable misdemeanor which has not a certain name given to it in the law:" 1 Russ. Cr., 3rd edit., p. 45.

(*q*) The distinction between a felony and a misdemeanor is pointed out post, pp. 891--2.

(*r*) *Reg.* v. *Buchanan*, 8 Q. B. 883.

(*s*) 2 Burr. 1125; *Reg.* v. *Eagleton*, 1 Dearsl. 376; *S. C.* 19 Jur. 940, is important with reference to the true

where difficulty occurs in distinguishing between indictable offences and wrongs remediable by action, and as exhibiting clearly the test in such case applicable. There the defendant was indicted for knowingly, fraudulently, and with intention to deceive the prosecutor, selling him beer short of the just measure. After a verdict of guilty, the defendant's counsel moved in arrest of judgment, on the ground that the fact charged against the defendant was, in truth, nothing more than a mere breach of a civil contract, not an indictable offence; and of this opinion was the Court,—Lord *Mansfield*, C. J., observing, that the alleged offence was, in truth, only "an inconvenience and injury to a private person," against which he might have guarded by due caution. "The selling an unsound horse as and for a sound one is not indictable, the buyer should be more upon his guard:" the offence that is indictable must be such an one as concerns the public.

But though difficulty sometimes presents itself in determining whether or not a particular act is indictable, it has been already sufficiently shewn (*s*), that an indictment will only lie for some wrong common to all the subjects of the Crown,—common, in this sense, that it affects them all, not of necessity equally, but in some degree. The distinction of public wrongs from private,—of crimes from civil injuries,—seems principally to consist in this, that private wrongs "are an infringement or privation of the civil rights which belong to individuals, considered merely *as individuals*," whilst public wrongs or crimes "are a breach

nature of a legal offence, the judgment recently delivered in that case affirms the principle laid down in *R.* v. *Wheatley*, supra. See also *Reg.* v. *Oates*, 1 Dearsl. 459; *R.* v. *Dunnage*, 2 Burr. 1130.

(*s*) Ante, pp. 96—100, 662; *R.* v. *Richards*, 8 T. R. 634.

and violation of the public rights and duties due to the whole community, considered *as a community*, in its social aggregate capacity" (*t*). Treason, murder, and robbery, are properly ranked amongst crimes, since, besides the injury involved in them to individuals, they strike at the very being of society, which cannot possibly subsist where acts of this sort are suffered to escape with impunity (*u*). Many inferior offences, also, of a public nature are indictable. And it is material to observe, that a crime will be deemed of a public nature, not merely where it causes some hurt, damage, or inconvenience to the public, but also where it is "of a public evil example" (*x*). Thus, it is an indictable offence for a parent who has the means of supporting her child (*y*) to neglect to provide sufficient food or necessaries for it, whilst of very tender years and unable to take care of itself (*z*), though, in this case, some injury to the health of the infant must be shewn (*a*). It is at common law indictable knowingly to take a glandered horse into a market, fair, or other place of public resort, to the danger of the liege subjects of the Crown (*b*), the doing so being now, moreover, a statutory offence by virtue of various enactments from time to time continued (*c*). And any outrage upon public decency (*d*), as well as against the public peace, will be indictable.

(*t*) 4 Bla. Com. p. 5.

(*u*) Id. ibid.

(*x*) Ante, p. 867.

(*y*) *Reg.* v. *Chandler*, 1 Dearsl. 453. See *Reg.* v. *Vann*, 2 Den. C. C. 325; *Reg.* v. *Hogan*, 2 Den. C. C. 277.

(*z*) *R.* v. *Friend*, Russ. & Ry. 20.

(*a*) *Reg.* v. *Phillpot*, 1 Dearsl. 179; *Reg.* v. *Cooper*, 1 Den. C. C. 459; *Reg.* v. *Hogan*, supra, n. (*y*); *Reg.* v. *Pelham*, 8 Q. B. 959.

(*b*) *Reg.* v. *Henson*, 1 Dearsl. 24.

(*c*) See the stat. 16 & 17 Vict. c. 62.

(*d*) *R.* v. *Sedley*, 17 How. St. Tr. 155, note; *Reg.* v. *Holmes*, 1 Dearsl. 207; *Reg.* v. *Webb*, 1 Den. C. C. 338; *S. C.* 2 Car. & K. 933; *Reg.* v. *Watson*, 2 Car. & K. 936, n. (*y*).

Bearing in mind what has been just said, we may conclude, that, in general, a 'crime' consists in some act or combination of acts involving a violation of some right or an attempt to violate some right, aggravated by the use of force and violence tending to a breach of the peace, or by the existence in the mind of the criminal of a fraudulent or malicious intention (*e*). The meaning of this word '*intention*,' in connection with criminal law, is most material. 'Intention' is, by non-professional writers, defined to be the design, purpose, or fixed direction of the mind to some particular object (*f*). It is clearly distinguishable from *motive*, or that which incites and stimulates to action. The motive which actuated a wrongdoer may doubtless serve as a clue to the intention,—the latter, however, not the former, it is which gives in law the character and quality to an act. "The intention to do the act," moreover, "exists for all criminal purposes where it is wilfully done, although the act itself was merely intended as a means of obtaining some ulterior object" (*g*).

Intention—meaning of this word.

To illustrate what has been above said, a man who takes a horse from the owner's stable without his consent may intend to despoil him of it, and fraudulently to appropriate it for his own benefit; in this case he is guilty of theft: he may intend to use it for some temporary occasion of his own, and then to return it to the owner; in this case he commits a trespass only. He may take the horse as a distress for rent due from its owner, in which case he is justified by the law. In each of these cases the act done is substantially the same,

(*e*) See Cr. L. Com., 4th Rep., p. 13. What is here said is not offered as a definition of the word 'crime,'—if so, it would be open to much objection—but rather as explanatory of its meaning.

(*f*) Webst. Dict. ad verb. 'Intention.'

(*g*) Cr. L. Com., 4th Rep., p. 15.

and it is mainly the intention of the person doing it which determines whether it shall be the subject of civil or of criminal cognisance, or whether it be altogether innocent (*h*).

Sometimes, no doubt, as before observed, the statute law expressly declares, that such and such acts shall be criminal, and shall expose to punishment the individual convicted of doing them. In such cases any inquiry as to the intent which actuated the party charged would, unless with a view to a mitigation of punishment, be immaterial.

Sometimes a particular act is declared by the legislature to be *primâ facie* criminal, so as to cast upon the party convicted of having done it the onus of proving that his intent was innocent. In much the larger class of cases the intent of the actor is material, and, to insure conviction, must satisfactorily be proved on the part of the prosecution.

In illustration of these remarks may be cited the recent stat. 14 & 15 Vict. c. 19, which, inter alia, enacts, that if any person shall be found by night having in his possession, without lawful excuse (the proof of which shall be on him), any implement of housebreaking, he shall be guilty of a misdemeanor. Under this part of the Act a conviction may, of course, be obtained, without proof of any guilty intention in the mind of the accused (*i*). Another portion of the statute in question declares to be a misdemeanor the being found by night in any dwelling-house with intent to commit a felony therein. To convict under this clause, some facts must be shewn whence the intent of the party

(*h*) Cr. L. Com., 4th Rep, pp. 13--14.

(*i*) *Reg.* v. *Bailey*, 1 Dearsl. 244, with which compare *Reg.* v. *Oldham*, 2 Den. C. C. 472.

charged may be inferred. It was, indeed, laid down by Lord *Mansfield*, as generally true (*k*), that, where an act in itself indifferent, if done with a particular intent, becomes criminal, there the intent must be proved and found by the jury; but where the act is in itself unlawful, the proof of justification or excuse lies on the defendant, and, in failure thereof, the law implies a criminal intent.

A guilty mind, however, is, in general, essential to the legal conception of crime. In what, then, it may be asked, does it consist? It would seem to include, 1st, every case of intentional or voluntary wrong where the mind is *actively* in fault; 2ndly, cases where the mind is, as it were, *passively to blame*, i. e. where hurt or damage results from want of exercising sufficient caution (*l*). With reference to each of these classes of cases, a few remarks may, in this place, properly be offered.

Malice—what.

As regards the former class of cases, where the mind is actively in fault, we may infer, from what was said at a former page (*m*), that there are two kinds of 'malice,' by either of which an offender may be actuated: malice in fact, i. e. where he acted from "a motive of actual ill-will and a design to injure;" and malice in law, which consists in "the wilful doing of a prohibited or injurious act without lawful excuse" (*n*). The legal import of the term in question differs, indeed, somewhat from its acceptation in common conversation. It is not, as in ordinary speech, an expression merely denoting the existence of hatred or ill-will to an individual, but may mean any wicked or mischievous

(*k*) *R.* v. *Woodfall*, 5 Burr. 2667.
(*l*) Cr. L. Com., 7th Rep., p. 22.
(*m*) Ante, p. 738.
(*n*) Cr. L. Com. 6th Rep., p. 52; Per *Littledale*, J., *M'Pherson* v. *Daniels*, 10 B. & C. 272.

intention of the mind (*o*). Thus, on a prosecution for murder, which is always alleged in an indictment to have been committed '*of malice aforethought*,' it is not essential to shew that the prisoner had any enmity to the deceased, nor would proof of the absence of ill-will furnish the accused with any defence, provided that the charge against him in other respects were established (*p*).

It can scarcely be necessary to add, that where the mind is actively in fault, it will make no difference in the criminal quality of the act done, whether the offender do it *directly* with his own hand, or *indirectly* by some other means. If poison be administered through the medium of an innocent agent, the prime mover is criminally responsible (*q*).

Where the mind is passively in fault.

In the latter of the two classes of cases above alluded to (*r*), viz. where the mind is passively to blame, criminality would seem to consist in the wilfully incurring the risk of causing loss or suffering to others. If the doer of an act know or believe that an evil consequence will result therefrom, he is just as culpable as if he had acted with the most direct intention to injure. If a person take upon himself to administer drugs, being ignorant of their probable effects, and thus cause the death of another, he will be guilty of culpable, i. e. of criminal negligence (*s*).

Intention—how provable.

A wrong intent, then, or something tantamount thereto, being ordinarily an essential element in crime,—how, it may be asked, is this intention to be proved? Now, a jury

(*o*) See per *Best*, J, *R.* v. *Harvey*, 2 B. & C. 268; *R.* v. *Hunt*, Moo. C. C. 93; *R.* v. *Cooke*, 8 Car. & P. 582; *R.* v. *Farrington*, Russ. & Ry. 207.

(*p*) Post, Chap. 2.

(*q*) Cr. L. Com., 7th Rep., p. 30; *Reg.* v. *Michael*, 2 Moo. C. C. 120.

(*r*) Ante, p. 872.

(*s*) Cr. L. Com., 7th Rep. p. 26.

is justified in inferring the intent from *overt* acts, because every man, as well in criminal, as in civil (*t*), procedure, must be taken to have intended that which is the necessary or natural consequence of his own act. It is an universal principle, that, "when a man is charged with doing an act of which the probable consequence may be highly injurious, the intention is an inference of law resulting from the doing the act" (*u*). Thus, where the defendant was indicted for a nuisance, and it was on his behalf contended, that, to render him liable, it must be his object to create a nuisance, or else that that must be the necessary and inevitable result of his act, *Littledale*, J., answered, "If it be the probable consequence of his act, he is answerable as if it were his actual object. If the experience of mankind must lead any one to expect the result, he will be answerable for it" (*v*).

The rule just stated, which is of much importance in criminal cases, is well illustrated by Mr. Starkie (*w*), who remarks, that, in estimating the real intention of an accused person, all the surrounding facts and circumstances of the case must be carefully examined, ex. gr. on a trial for murder, the nature of the instrument used, and the part of the body of the deceased on which the wound was inflicted, must especially be taken into consideration in determining the precise nature and quality of the offence; and this must

(*t*) Per *Cresswell*, J., *Graham* v. *Chapman*, 12 C. B. 98; Per *Jervis*, C. J., Id. 103, cited arg. *Young* v. *Waud*, 8 Exch. 229.

(*u*) Per Lord *Ellenborough*, C. J., *R.* v. *Dixon*, 3 M. & S. 15; *R.* v. *Philp*, 1 Moo. C. C. 263, 274; *Reg.* v. *Hill*, 8 Car. & P. 274; *R.* v. *Sheppard*, Russ. & Ry. 169; *R.* v. *Mazagora*, Id. 291; Per Lord *Campbell*, 9 Cl. & F. 321.

(*v*) *R.* v. *Moore*, 3 B. & Ad. 184, 188; Per *Littledale*, J., *Reg.* v. *Lorett*, 9 Car. & P. 466.

(*w*) Evid., 3rd edit., vol. 2, p. 692.

be done in accordance with what that learned writer describes as "the plain and fundamental rule, that a man's motives and intentions are to be inferred from the means which he uses and the acts which he does." In *Rex* v. *Farrington* (*x*), the prisoner was indicted, under a statute since repealed, for setting fire to a mill with intent to injure the occupier thereof; and, after a verdict of guilty, sentence was respited, a doubt being entertained whether it was not requisite to give in evidence some fact,—other than the mere act of setting fire to the mill,—from which an intent to injure some one might be inferred; the conviction, however, in this case, was, on reference to the Judges, held to have been right, because "a party who does an act wilfully, necessarily," in legal contemplation, "intends that which must be the consequence of the act."

Mere intention not cognisable by law.

Mere intention, nevertheless, however criminal, cannot render the person entertaining it, amenable to law; some outward overt act coupled with a wilful disposition or culpable negligence is essential to fill out the legal conception of a crime. Hence it is necessary to distinguish between a bare *intention* and an *attempt*, in which the act is superadded to the intention. An attempt merely to commit a felony is in many cases a misdemeanor (*y*), and an attempt to commit a misdemeanor may itself amount to a misdemeanor (*z*). "So long," says Lord *Mansfield*, in *Rex* v. *Scofield* (*a*), "as an act rests in bare intention, it is not punishable by our laws: but immediately when an act is done, the law judges, not only of the act done, but of the in-

An attempt may be so.

(*x*) Russ. & Ry. 207.

(*y*) See *Reg.* v. *Ferguson*, 1 Dearsl. 427; *Reg.* v. *Marsh*, 1 Den. C. C. 505.

(*z*) On an indictment for a felony or misdemeanor, the jury may convict of an attempt to commit the same, post, p. 894.

(*a*) Cald. 397, 403.

tent with which it is done; and if it is coupled with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable."

In *Rex* v. *Higgins* (*b*), accordingly, the act of soliciting and inciting a servant to steal his master's goods was held to be a misdemeanor, though it was not alleged nor did it appear that the principal had ever been convicted of the felony. On behalf of the accused, it was here argued, that "the general principle of our penal code is to punish the act and not the intent" (*c*). To this, however, Lord *Kenyon*, C. J., replied, "But is there not an act done, when it is charged that the defendant solicited another to commit a felony? The solicitation is an act." In unison also with the principle before us, it has recently been held, that the mere possession of obscene and indecent prints is not indictable, because "the law will not take notice of an intent without an act," and possession is not an act; but the procuring of such prints with intent to publish them is indictable, being an act done, *sc.* the first step towards the committing the misdemeanor of publishing obscene prints (*d*).

But though "it is a principle of natural justice and of our law, that *actus non facit reum nisi mens sit rea*,—the intent and the act must both concur to constitute the crime" (*e*) —we may conclude that, where no evil effect whatever is produced, criminal endeavours, evidenced by manifest overt

(*b*) 2 East, 5; *R.* v. *Vaughan*, 4 Burr. 2494.

(*c*) 2 East, 9.

(*d*) *Dugdale* v. *Reg.*, 1 E. & B. 435, 439. See *R.* v. *Heath*, Russ. & Ry. 184; *R.* v. *Fuller*, Id. 308.

(*e*) Per Lord *Kenyon*, C. J., *Fowler* v. *Padget*, 7 T. R. 514, cited Leg. Max., 2nd edit., p. 275.

The crime of high treason, as defined by statute, offers an exception to the rule above stated; but, even in this case, an overt act must be proved, post, Chap. 2.

acts, are and ought justly to be punishable. And this being so, little difficulty need be felt in regard to another important class of cases, viz. where some mistake is made in carrying out the criminal design, so that it causes results not intended nor anticipated by the actor. Suppose, for instance, that a mistake is made in respect of the person at whom the crime is levelled—as where the offender shoots at A., supposing he is shooting at B. It is clear that the difference of persons can make none in the quality or magnitude of the offence or in the amount of punishment due to it. The crime here consists in the wilful doing of a prohibited act—the act of shooting at A. was wilful, although the offender mistook him for another (*f*). A like remark also is applicable, where, through accident or the mistake of a party not privy to the criminal design, the mischief falls either on a person not intended, or on the party intended, but in a manner different from that intended (*g*). In cases such as the foregoing, the act done is primâ facie criminal, and the mind of the party doing it or planning it is criminal, and, consequently, justice requires that the amount of punishment, assignable for such act, should be unaffected by the accident which affected the result.

Capacity to commit crime.

From the general principle already sufficiently illustrated —that our criminal law looks mainly to the intention which actuated the accused,—important consequences flow. The very statement of this proposition implies a presumption that the individual, whom it is sought to bring within the operation of the law, has mental capacity, is a free agent, and possesses the power of electing to abstain from

(*f*) Cr. L. Com., 7th Rep., p. 26, Per *Park*, J., *R.* v. *Comer*, 7 Car. & P. 438.
(*g*) Cr L. Com., 7th Rep., p. 27;

what is forbidden rather than suffer the consequences of offending; our criminal law declines therefore to punish where a party, from want of understanding or mental disease, is either unconscious of what he does or ignorant of the nature and moral quality of his act. Hence the exemption from criminal responsibility of lunatics and children of very tender years.

Neither does that law ordinarily inflict its penalties where a party is, against his will, compelled to do a wrongful act, inasmuch as the dread of future penalties cannot be expected to prevail against the certainty of present suffering. Hence the doctrine that duress will in some cases excuse an act criminal per se, as when committed by a feme covert sub potestate viri. Further, the principle upon which our criminal law acts is inapplicable where hurt or damage results from innocent mistake or inevitable accident, which could not have been foreseen or avoided, for here no blame of any kind is justly attributable to the author of the injury done or calamity occasioned. Of the particular class of cases now adverted to, homicide by misadventure (*h*) presents a familiar instance. Again, where an individual in the performance of his official duties, as the sheriff or the gaoler, is required to inflict punishment, he may be deemed to stand excused as not being a free agent, but rather a passive instrument to carry out the law, and blameless by virtue of the maxim *quod necessitas cogit, excusat* (*i*).

In any of the cases just specified, a criminal intention, in the full sense of that term, is wanting, and therefore the act done is deficient in that particular quality or ingredient

(*h*) As to which, post, Chap. 3, Sect. 1. (*i*) Post, Chap 3, Sect. 1

which is necessary to constitute a crime. The aim and object, moreover, of civil punishment is *to deter* (*k*), and it obviously will not be effectual to deter those who, being similarly circumstanced with the accused individual, either cannot, through lack of understanding, appreciate its meaning and nature, or, being coerced by some overruling influence, are insensible to its terrors.

Neither, by parity of reasoning, will punishment in any of the cases supposed deter the criminal himself from again offending. Lunatics, infants, and femes coverts are, then, in many cases held irresponsible and dispunishable for acts, primâ facie criminal, done by them. Restricting my remarks in regard to the capacity to commit crime almost wholly to the three classes of persons here indicated, I will first inquire to what extent and under what circumstances mental derangement or insanity may excuse from the ordinary consequences of crime. Now Mr. *Erskine* in his argument in *Hadfield's case* (*l*), thus forcibly states the elementary principles which are here to guide us:—"It is agreed," he says, "by all jurists, and is established by the law of this and every other country, that it is the reason of man which makes him accountable for his actions, and that the deprivation of reason acquits him of crime." Neither in civil (*m*), nor in criminal, cases, however, will our law, provided a man be compos mentis, measure the degree of his capacity. A weak man, albeit much below the ordinary standard of human intellect, is bound by his contracts, may

Non compos mentis—when held irresponsible.

(*k*) The end of punishment is to prevent the criminal from doing further injury to society, and to prevent others from committing the like offence: Beccar. Cr., Chap. 12.

(*l*) 27 How. St. Tr. 1309, 1310.

(*m*) Ante, p. 612.

exercise dominion over his property, and is responsible for his crimes. From such responsibility he alone is emancipated who is, in the language of our law, *non compos mentis* (*n*). The main inquiry before us, accordingly, is this:—what may, in connection with criminal law, be the meaning and significance of the phrase just used? what is that kind or species of insanity which exempts from punishment on the ground that its existence is inconsistent with a criminal intent? Clearly it is not every degree of insanity which suffices for this purpose. Many men of general ability are upon some one topic insane, provided their opinions be tested by those entertained by the world at large. One labouring under the grossest delusions may for many purposes be treated, and held accountable, as if sane, ex. gr. he may, possibly, be admitted to give evidence on a criminal trial in a Court of law; and where such an objection is taken to the competency of a witness, it is for the Judge to say whether the insane person has the sense of religion in his mind, and whether he understands the nature and sanction of an oath; and then the jury will have to decide on the credibility of, and weight due to, his evidence (*o*). It is clear, then, that a man may be non compos mentis *quoad hoc*, and yet not non compos mentis altogether (*p*).

In *M'Naghten's case* (*q*), the accused was charged with murder, and, the fact of wilful homicide being established, the defence of insanity was set up, supported by evidence

(*n*) See per *Erskine*, arg. in *Hadfield's case*, above cited; Per *Maule*, J., *Reg.* v. *Higginson*, 1 Car. & K. 130; Per *Pollock*, C. B., *Clift* v. *Schwabe*, 3 C. B. 478; *Borradaile* v. *Hunter*, 5 M. & Gr. 639. And see *Dormay* v. *Borradaile*, 5 C. B. 380; *S. C.*, 16 L. J., Chanc., 337.

(*o*) *Reg.* v. *Hill*, 2 Den. C. C. 254.

(*p*) See Per *Alderson*, B., 2 Den. C. C. 260.

(*q*) 10 Cl. & F. 200.

that the accused was affected by morbid delusions which carried him beyond the power of his own control as regarded acts connected therewith, and left him no moral perception of right and wrong. It was further shewn to be the nature of the disease under which the prisoner suffered, gradually to acquire intensity, and then suddenly to develope itself with great violence; the prisoner was acquitted on the ground of insanity. In consequence of this verdict, which led to some discussion in the House of Lords, certain questions were by that House proposed to the Judges, from the answers to which, given by the majority of the bench (*r*), must be deduced the degree of criminal responsibility attaching to one affected with mental disease; it becomes necessary, therefore, in this place to set out the substance of the questions, on the occasion alluded to, thus formally proposed, and of the answers advisedly returned thereto,

The first question submitted to the judges in *M'Naghten's case* was as follows:—"What is the law respecting alleged crimes, committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons; as, for instance, where, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?" To this question, the answer given was, that a person labouring under such partial delusion only, and not being in other respects insane, although he did the act complained of with a view, under the influ-

(*r*) *Maule*, J., diss.

ence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, is nevertheless punishable according to the nature of the crime committed, "if he knew at the time of committing such crime that he was acting contrary to law," i.e. to the law of the land (*s*).

We further collect from *M'Naghten's case*, that, when a person alleged to be afflicted with insane delusions respecting one or more particular subjects or persons is charged with the commission of a crime, and insanity is set up as a defence, the jury should be instructed, that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction (*t*); and that, to establish a defence on the ground of insanity, it must be clearly shewn, that, at the time of the committing of the act charged in the indictment, the party accused was "labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." If the accused was conscious that the act in question was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable. The usual course, accordingly, is to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act which was wrong; the question thus submitted being accompanied with such observations and explanations as the circumstances of each particular case may require (*u*).

(*s*) 10 Cl. & F. 209.

(*t*) See also per *Rolfe*, B., *Reg.* v. *Stokes*, 3 Car. & K. 188.

(*u*) 10 Cl. & F. 210, 211. See *Reg.* v. *Oxford*, 9 Car. & P. 525; *S. C.* Townsend's St. Tr., vol. 1, p. 110.

Another question of much interest also sometimes presents itself on a criminal trial:—If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused? The answer to this question is, that, if the accused labours under a partial delusion only, and is not in other respects insane, he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was, that the deceased had inflicted a serious injury on his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment (*v*).

To the evidence of scientific men conversant with the disease of insanity, who have examined and conversed with the accused person,—who can, besides testifying to his words and actions, explain the nature of the delusions under which he may be labouring, and the ordinary effect of such delusions upon the mental functions,—much weight will naturally be attached by a jury when engaged in the arduous task of investigating the question, whether one accused of crime was sane or insane at the time of its commission. Where, moreover, on the trial of such an issue, the facts of the case are admitted or not disputed, and the question becomes substantially one of science only, it may be *convenient* to ask a medical witness, who has been pre-

(*v*) 10 Cl. & F. 211.

sent during the trial, his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, and as to his perception of the difference between right and wrong; but, as we learn from *M'Naghten's case* (*x*), it is not a matter of *right* to put such a question.

Amongst medical practitioners, however, and those experts who have appeared as witnesses to give evidence touching insane and morbid delusions at criminal trials, a very wide difference of opinion exists on various important points relating to the responsibility of persons mentally affected, and mainly as to these fundamental questions: Are there states and conditions of mind in which responsibility is modified only,—not annulled? May the insane be, in certain cases, fit objects for punishment? Nay, further, may not punishment be so applied to some criminals of unsound mind that the reason of its application may be appreciated by them and beneficial results thence ensue? It is the opinion of some scientific men, that much may be said in favour of a scale of punishments for the insane, graduated—so far as the results of experience and observation may permit—to their different degrees of responsibility and criminality. The inquiry hinted at, however, could scarcely, with propriety, be conducted in these Commentaries, which profess to deal with the law as it is, not as, in the opinion of jurists, it ought to be. I will merely add, therefore, that when a person, upon his trial for an alleged crime, seeks to excuse himself upon a plea of insanity, it will be for him to make out clearly that he was insane at the time of committing the offence charged against him. The onus of so

(*x*) 10 Cl. & F. 211-2.

doing rests on him, and the jury must be satisfied that, at the time in question, he actually was insane. If the matter be left in doubt, it will be their duty to convict him, for, as already stated (*y*), "*every man must be presumed to be responsible for his acts till the contrary is clearly shewn*" (*z*).

It is now provided by statute (*a*), that if, upon the trial of any person, whether for treason, felony, or misdemeanor, evidence is adduced of his insanity at the time of committing the act charged against him, and the jury acquit him, they must be required to find specially whether he was insane at the time in question, and to state whether he is acquitted on the ground of insanity; and, if so, the Judge presiding at the trial may order the prisoner to be kept in custody until the Queen's pleasure be known respecting him. It sometimes happens, that, upon arraignment on a criminal charge, the accused appears manifestly to be insane: when this is so, the question as to his sanity will have to be tried by a jury returned instanter for that purpose, and, if found to be insane, the detention of the prisoner will be ordered (*b*).

Responsibility of one who commits crime whilst intoxicated.

An inquiry, somewhat analogous to the preceding, here invites attention: What degree of liability attaches to one who, whilst intoxicated, commits a crime? If, says *Parke*, B., a man voluntarily makes himself drunk, that is no excuse for any crime which he may commit whilst in that state; he must take the consequence of his own act, for many

(*y*) Ante, p. 882.

(*z*) Per *Rolfe*, B., 3 Car. & K. 188.

(*a*) 39 & 40 Geo. 3, c. 94, s. 1; 3 & 4 Vict. c. 54, s. 3.

(*b*) 39 & 40 Geo. 3, c. 94, s. 2. See *R.* v. *Pritchard*, 7 Car. & P. 303; *Reg.* v. *Goode*, 7 Ad. & E. 536.

crimes would otherwise go unpunished (*c*). But drunkenness may be taken into consideration in cases of homicide, where what the law deems sufficient provocation has been given; because the question in such cases is, whether the criminal act is to be attributed to the passion of anger excited by the previous provocation, and that passion is more easily excitable in a person when in a state of intoxication than when he is sober (*d*); though, if there were really a previous determination to resent a slight affront in a barbarous manner, the state of drunkenness in which the prisoner was would furnish no excuse (*e*).

Again, in *Reg.* v. *Cruse* (*f*), *Patteson*, J., observes: "Although drunkenness is no excuse for any crime whatever, yet it is often of very great importance in cases where it is a question of intention. A person may be so drunk as to be utterly unable to form any intention at all, and yet he may be guilty of very great violence." So, where the question is, whether words accompanying an act were uttered with a deliberate purpose or were merely idle expressions, the drunkenness of the person uttering them is proper to be considered (*g*). And it is evident, that, where the question is, whether an act done was wilful or accidental, all the circumstances of the case must be taken fully into account. If, for instance, the question is, whether a house was set on fire designedly or by accident, evidence of the

(*c*) *R.* v. *Thomas*, 7 Car. & P. 820; *U. S* v. *M'Glue*, 1 Curtis (U. S.) R. 1; 4 Bla. Com. p. 26, citing Co. Litt. 247.

(*d*) *R.* v. *Thomas*, supra; *R.* v. *Meakin*, 7 Car. & P 297; Cr. L. Com., 7th Rep., p. 20. But see *R.* v. *Carroll*, 7 Car. & P. 145, where *Park*, J., dissents from *R* v. *Grindley*, cited 1 Russ. Cr, 2nd edit., p. 8.

(*e*) Per *Parke*, B., 7 Car. & P. 820.

(*f*) 8 Car. & P. 541, 546.

(*g*) Per *Parke*, B., 7 Car. & P. 820.

inebriated state of the person charged with the arson will be admissible to induce the jury to come to the more favourable conclusion.

Habitual drunkenness, although not in itself affording excuse for crime, may induce insanity, which will render the individual affected by it wholly irresponsible for his acts (*h*).

Criminal responsibility of infant.

Incapacity to commit crime may result from immaturity of years (*i*), the rule of our law being, that under *seven* years of age an infant cannot be guilty of felony, for then a felonious intention is almost an impossibility in nature (*k*); also, that although an infant under fourteen years of age shall be *primâ facie* adjudged to be *doli incapax*, yet if it appear to the Court and jury that he was *doli capax* and could discern between good and evil, he may be convicted (*k*), even capitally, because in such case the rule would apply—*malitia supplet ætatem*. Accordingly, in *York's case* (*l*), a boy ten years old was held to have been rightly convicted of murder, many minute facts having been adduced in evidence on the part of the prosecution which were "tokens of a mischievous discretion" in him. In that case, indeed, the prisoner, after several reprieves, received finally a conditional pardon. But in another case (*m*), a boy between eight and nine years of age, having been found guilty of setting fire to certain buildings, and it appearing that he had been actuated by malice, cunning, and revenge, is said to have been hanged. In *Rex* v. *Wild* (*n*) also, the prisoner, a boy

(*h*) See *U. S.* v. *M'Glue*, 1 Curtis (U. S) R. 1.

(*i*) Ante, p. 878.

(*k*) 4 Bla. Com. p. 23.

(*l*) Foster, 70.

(*m*) *R.* v. *Dean*, 1 Hale P. C. (ed. 1800), p. 25, n. (*u*); and see the cases cited Id. pp. 26, 27; 4 Bla. Com. pp. 23, 24.

(*n*) 1 Moo. C. C. 452.

under the age of fourteen years, was convicted of murder and sentenced to death, although his life was subsequently spared. And in *Rex* v. *Owen* (*o*), where the accused, a child ten years of age, was indicted for stealing coal, *Littledale*, J., thus stated the law touching the criminal liability of infants: "Whenever a person committing a felony is under fourteen years of age, the presumption of law is that he or she has not sufficient capacity to know that it is wrong, and such person ought not to be convicted, unless there be evidence to satisfy the jury that the party, at the time of the offence, had a guilty knowledge that he or she was doing wrong."

A male infant under the age of fourteen years is by a presumption of law, which cannot be rebutted (*p*), deemed incapable of committing a rape; for although in some cases, as just observed, *malitia supplet ætatem*, yet in this particular species of felony the law supposes an imbecility of body as well as of mind (*q*).

"As to misdemeanors and offences that are not capital," says Sir M. Hale (*r*), "in some cases an infant is privileged by his non-age, and herein the privilege is all one, whether he be above the age of fourteen years or under, if he be under one and twenty years; but yet with these differences, if an infant under the age of twenty-one years be indicted of any misdemeanor, as a riot or battery (*s*), he shall not be

(*o*) 4 Car. & P. 236.

(*p*) *Reg.* v. *Jordan*, 9 Car. & P. 118; *Reg.* v. *Brimilow*, Id. 366; *Reg.* v. *Philips*, 8 Car. & P. 736; *R.* v. *Eldershaw*, 3 Car. & P. 396.

(*q*) 4 Bla. Com. p. 212; *R.* v. *Groombridge*, 7 Car. & P. 582.

See, further, in connection with the above subject, *Reg.* v. *Allen*, 1 Den. C. C. 364; 1 Hale P. C. p. 670; 3 Inst. 59.

(*r*) P. C., vol. 1, p. 19; 4 Bla. Com. p. 22.

(*s*) Or assault, *Reg.* v. *Read*, 1 Den. C. C. 377.

privileged barely by reason that he is under twenty-one years, but if he be convicted thereof by due trial, he shall be fined and imprisoned: and the reason is, because upon his trial the Court ex officio ought to consider and examine the circumstances of the fact, whether he was doli capax and had discretion to do the act wherewith he is charged; and the same law is of a feme covert. But if the offence charged by the indictment be a mere non-feasance (unless it be of such a thing as he is bound to by reason of tenure or the like, as to repair a bridge (*t*), &c.), there, in some cases, he shall be privileged by his non-age, if under twenty-one, though above fourteen years, because laches in such a case shall not be imputed to him."

Criminal responsibility of feme covert.

Although duress will sometimes afford ground of defence on a criminal trial (*u*), yet as regards persons in private relations, the constraint of a superior is not, save in the case of a feme covert acting sub potestate viri, allowed as an excuse for criminal misconduct; neither a son nor a servant being excused for the commission of any crime by the command or coercion of the parent or master. In some cases, however, the command or authority of the husband, either express or implied, will privilege the wife from punishment (*v*). If, for instance, a woman commit theft, burglary, or some other offences against the laws of society, by the coercion of her husband or even in his company, which the law construes a coercion, she is held excused by our law as having acted under compulsion and not of her own will (*w*). But immunity is not granted to the wife

(*t*) See *R.* v. *Sutton*, 3 Ad. & E. 597; Macpherson Inf., p. 451.

(*u*) Ante, p. 878. Per Lord *Denman*, C. J., *Reg.* v. *Tyler*, 8 Car. & P. 620.

(*v*) 4 Bla. Com. p. 28.

(*w*) 4 Bla. Com. p. 29; 1 Hale P. C. pp. 45, 516; 1 Hawk. P. C., c. 1, s. 9. See *Reg.* v. *Brooks*, 1 Dearsl. 184, cited post; *R.* v. *Price*, 8 Car. & P.

when guilty of treason, murder, or manslaughter in the presence of or under the actual coercion of her husband (*x*), and husband and wife may be jointly convicted of an assault (*y*). And even where the offence charged is less heinous in degree, special circumstances—as if the husband was a cripple and bedridden—may be given in evidence to repel the presumption of coercion (*z*). Lastly, where the wife commits a felony or other crime in the absence of her husband, although by his command, she may be convicted as a principal (*a*).

Offences—how classified.

Having thus briefly exhibited the more important elementary principles which pervade our criminal law, and having discussed the capacity of an individual to commit crime, somewhat yet remains to be said touching the classification of offences recognised amongst us.

It might possibly be imagined by one not conversant with criminal law, that some precise definition could readily be given, or some test be applied, whereby the more serious, i. e. indictable, offences might be at once marked out and distinguished alike from minor infringements of the law and from actionable wrongs. It might perhaps be inferred—regard being had to the admitted importance of disseminating amongst the public a correct knowledge of criminal laws—that the means of acquiring without much difficulty such a knowledge would be placed within the reach of all. But these reasonable expectations would cer-

19; *Reg.* v. *Matthews*, 1 Den. C. C. 596.

(*x*) 1 Hale P. C. p. 44; *Reg.* v. *Manning*, 2 Car. & K. 903, n.

(*y*) *Reg.* v. *Cruse*, 8 Car. & P. 541; *Reg.* v. *Ingram*, 1 Salk. 384; *Reg.* v. *Bird*, 2 Den. C. C. 94.

(*z*) Per *Vaughan*, J., *Reg.* v. *Cruse*, 8 Car. & P. 553-4; *R.* v. *Hughes*, 1 Russ. Cr., 3rd edit., p. 18.

(*a*) 1 Hale P. C. p. 45; *R.* v. *Morris*, Russ. & Ry. 270.

tainly not under our existing system of criminal jurisprudence be realised. Not merely between specific offences, but between the leading classes and divisions thereof, the boundaries and limits are in our law but too often purely technical and artificial. For this various reasons may be assigned deducible from the history of our common law—from the mode in which rules and definitions applicable in civil proceedings have been assumed as bases of legislation in regard to public wrongs—from legislative neglect on the one hand and judicial exertion to supply deficiencies on the other (*b*).

Crimes have from a very early period been distributed by the law of England into three classes or divisions, viz. *Treasons, Felonies,* and *Misdemeanors.*

The prominent feature in the crime of High Treason is, as will presently appear, the violation of the allegiance due from a subject to the sovereign as the supreme Magistrate of the state. Between felonies and misdemeanors the distinction at the present day is in great measure arbitrary and very unsatisfactory, a felony being distinguishable from a misdemeanor rather by the consequences which follow on a conviction for the offence than by any particular element or ingredient appearing in it.

'Felony' is, in our criminal law, intermediate between treason (which is a higher kind of felony) and misdemeanor; and it is distinguishable from both. The crime of felony is of remote origin and was founded upon feudal principles. Its incidents were not formerly, as they now are, of a merely arbitrary nature peremptorily annexed to certain criminal acts. It sprung from the feudal relations. Thus, the main

(*b*) See Cr. L Com., 4th Rep., p. 14.

incident of felony in former times was the forfeiture of the tenant's land to the lord of the fee, and this was a necessary consequence of the dissolution, by the misconduct or 'felony' of the tenant, of that mutual compact between the two parties which formed the essence of the feudal tenure. For a long time, and even after felony had ceased to signify merely a failure of the tenant's duty with reference to laws of feudal allegiance, the term was used as descriptive of a crime which subjected the offender to capital punishment, and which, if he evaded punishment by flight, deprived him of his property and of all civil rights (*c*). And, at the present day, a conviction for felony, ipso facto, induces a forfeiture of the property—real or personal or both—of the offender (*d*).

The term 'misdemeanor' applies to all crimes of an inferior degree which do not fall within either of the preceding divisions. A misdemeanor is, in truth, according to its ordinary acceptation, any offence lower in the scale of crime than felony (*e*), and, as above stated, separated from it by a line entirely arbitrary. Though, we must remember that the question whether a particular act is a felony or a misdemeanor at common law will, in case of difficulty, be determinable by the judges, whose duty it is to declare, as well as to administer, the law. Thus, in *Reg.* v. *Sharman* (*f*), a point having arisen before the Court of Criminal Appeal, whether the uttering a forged testimonial to character, know-

(*c*) Cr. L. Com., 4th Rep., p. 11.

(*d*) Cr. L. Com., 4th Rep., p. 12; 4 Bla. Com. p. 94. And see, particularly, Mr. Warren's Abridgm. Bla. Com. pp. 649, 650.

(*e*) 4 Bla. Com. p. 5. A misdemeanor may, accordingly, under certain circumstances, merge in a felony: see per *Abbott*, C. J., *R.* v. *Carlile*, 3 B. & Ald. 164; *Reg.* v. *Button*, 11 Q. B. 929; 1 Russ. Cr., 3rd edit., p. 50. But see *Reg.* v. *Neale*, 1 Den. C. C. 36; *Reg.* v. *Case*, Id. 580; 14 & 15 Vict. c. 100, s. 12.

(*f*) 23 L. J., M. C., 51; *S. C.* 1 Dearsl. 285.

ing it to be forged, is a misdemeanor at common law,—the intent found by the jury being to deceive, and thereby to obtain a situation of emolument, the Court were of opinion that "it is an indictable offence at common law to utter a forged document the forging of which is an offence at common law" (*g*). Wherever, indeed, the Court is called upon to decide whether a violation of our common law has upon the evidence adduced been committed, it must, in deciding this question affirmatively, likewise declare whether the offence constituted by the acts proved be in truth a felony or a misdemeanor (*g*).

In connection with the subject here touched upon, may conveniently be noticed a recent statutory provision (14 & 15 Vict. c. 100, s. 12) which enacts, that "if, upon the trial of any person for any misdemeanor, it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanor, and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the Court before which such trial may be had shall think fit in its discretion to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor."

Another clause (sect. 9) of the last-cited statute, which applies generally in trials for felonies or misdemeanors, also, in this introductory chapter, deserves attention. We have already seen (*h*), that an attempt to commit a crime may be

(*g*) See, also, the cases cited ante, p. 869. *Wright* v. *Reg.*, 14 Q. B. 148; *Reg.* v. *King*, 7 Q. B. 782; *Williams* v. *Reg.*, 7 Q. B. 250.

(*h*) Ante, p. 875.

cognisable by our law; and by the section in question, which recites, that "offenders often escape conviction, by reason that such persons ought to have been charged with attempting to commit offences, and not with the actual commission thereof," it is enacted, "that if, on the trial of any person charged with any felony or misdemeanor, it shall appear to the jury, upon the evidence, that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not, by reason thereof, be entitled to be acquitted; but, the jury shall be at liberty to return, as their verdict, that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same; and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the said indictment; and no person so tried as herein lastly mentioned shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanor for which he was so tried."

Besides the three great classes of indictable offences, viz. treasons, felonies, and misdemeanors, above alluded to, there are many statutory offences subject to the summary jurisdiction of justices of the peace, and, in general, punishable much less severely than those which are of a serious character and dangerous to the community (*i*). The right to examine into and punish certain specific offences in a summary manner, out of their sessions and without the inter-

(*i*) Cr. L. Com., 7th Rep., p. 12. By the recent statute, 18 & 19 Vict. c. 126, a summary power of conviction, in some cases, of simple larceny is, subject to certain restrictions, conferred on justices of the peace. See also the stats. 10 & 11 Vict. c. 82, and 13 & 14 Vict. c. 37.

vention of a jury, is conferred on justices of the peace by the statute law, no new offence being thus cognisable unless it is expressly made so by Act of Parliament (*k*). Wherever, consequently, a question arises as to the existence or limits of the justice's jurisdiction, recourse must be had to the wording of the particular statute under which its exercise is claimed. The leading rules laid down upon this subject being, that a power expressly given to a justice to do a particular act cannot be enlarged by mere inference; and, that the procedure adopted by him must be strictly conformable to the provisions and requirements of the statute whence its efficacy is derived (*l*). An authority, therefore, given by statute to two justices cannot be exercised by one only (*m*); and, where a complaint made to justices is required to be in writing, such formality must strictly be observed (*n*). Such being the elementary rules to be kept in mind respecting the jurisdiction of a justice of the peace, I may add, that a valid conviction by him should embrace two things: first, the adjudication of the fact which constitutes the civil offence; and, secondly, the award of the punishment which the magistrate is empowered to pronounce upon it; and if either of these essentials be wanting altogether, or be imperfect, the conviction will be bad (*o*).

In regard to offences summarily punishable by justices of the peace, it certainly does not fall within the plan of this work, even briefly, or otherwise than incidentally, to inquire;

(*k*) Paley on Convictions, 3rd edit., p. 15; Cr. L. Com., 7th Rep., p. 12.

(*l*) Paley on Convictions, 3rd edit., pp. 15, 16.

(*m*) Id., p. 23.

(*n*) Id., p. 32.

(*o*) Per Lord *Abinger*, C. B., *Griffith* v. *Harries*, 2 M. & W. 341; *Chaddock* v. *Wilbraham*, 5 C. B. 645.

I shall rather restrict myself to an examination of such of the more serious offences as seem especially to merit or demand attention from the student. For the due prosecution of this design, crimes may conveniently be divided into two classes, comprising, first, crimes against the Sovereign, the State, and the Community; secondly, crimes levelled directly at the Person, the Reputation, or the Property of individuals. Under the former of these classes I shall speak more particularly of High Treason, Conspiracy, and Nuisance: under the latter, of Homicide, Assault, Libel, Larceny, and some kindred offences, which are with difficulty distinguishable from it, or which, together with circumstances of aggravation, usually involve it. The concluding Chapter of this Book will give a succinct view of the Proceedings at a Criminal Trial.

CHAPTER II.

OF OFFENCES AGAINST THE SOVEREIGN, THE STATE, AND THE COMMUNITY.

THE design of this Chapter is to exhibit very briefly the characteristics of the more prominent and practically important of offences which may be regarded as levelled and specially directed against the Sovereign, the State, or the Community. The reader has already been sufficiently reminded that in strictness every criminal act, being done in violation of public law, involves an injury against society; the classification of crimes therefore here adopted (*a*), whilst it may conduce to simplicity of treatment and of arrangement, cannot, it is conceived, mislead.

High treason (*b*) being an offence committed in breach of the duty of allegiance, I may, before speaking of it, properly consider from whom and to whom allegiance is due. High treason.

The duty of allegiance—*natural* or *local*—is founded in the relation which subsists betwixt him who owes it and the Crown, and in the privileges derived by the former from that relation. Of 'natural' allegiance, says Sir M. Foster (*c*), the whole doctrine is comprehended in the Allegiance—natural or local.

(*a*) In the present and next ensuing Chapters.

(*b*) A lucid sketch of the law of treason is contained in the 6th Report of the Cr. L. Com., pp. 2--17, of which I have in these pages, as occasion offered, freely availed myself.

(*c*) Disc. High Tr. p. 184.

maxim *nemo potest exuere patriam*, whence it follows that a natural born subject owes allegiance at all times and in all places to the Crown as head of that society whereof he has through life been a member. 'Local' allegiance is founded in the protection which a foreigner enjoys for his person, his family, and effects during his residence here. The tie in question is severed therefore, ipso facto, on the determination of such residence.

An alien, whose sovereign is in amity with the Crown of England, residing here and receiving the protection of our law, owes during the time of his residence a local allegiance to the Crown. And if during such time he commit an offence which in the case of a natural born subject would amount to treason, he may be dealt with as a traitor. For his person and personal estate are as much under the protection of the law as those of a natural born subject, and if he be injured in either he has a remedy at law for such injury (*d*). An alien also, whose sovereign is at enmity with us, living here under the Queen's protection, if guilty of an act amounting to treason, may likewise be proceeded against as a traitor, inasmuch as from him is due a temporary local allegiance founded on that share of protection which he receives (*e*).

Allegiance—to whom due

Protection and allegiance are, then, reciprocal obligations, and the allegiance due to the Crown must clearly be paid to him who is in the full and actual exercise of the regal power and to none other—a king de facto, being in the full and sole possession of the crown, is a king within the Statute of Treasons presently adverted to; and the throne

(*d*) Fost. Disc. High Tr. p. 185; *Calvin's case*, 7 Rep. 5 b.
(*e*) Fost. Disc. High Tr. p. 185.

being full, any other person out of possession but claiming title is no king within the Act, be his pretensions what they may (*f*).

Statute of Treasons, &c.

Such being, in brief, the nature of that tie which binds the subject to his sovereign, let us consider the ingredients constituting the crime of treason; for a specification whereof recourse must be had to the Statute-book. Now the Statute of Treasons (25 Edw. 3, st. 5, c. 2), which was declaratory of the common law, enumerates the following species of treason, that is to say, "when a man doth compass or imagine the death of our lord the king, or of our lady his queen, or of their eldest son and heir; or if a man do violate the king's companion, or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir; or if a man do levy war against our lord the king in his realm, or be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm or elsewhere; and thereof be proveably attainted of open deed" (*g*). Further, it is material to notice that the statute 7 & 8 Will. 3, c. 3 (intituled an Act for regulating of Trials in cases of Treason and Misprision of Treason), enacts (sect. 2) that no person shall be convicted of high treason or misprision of treason (*h*), "but by and upon the oaths and testimony of two lawful witnesses, either both of them to the

(*f*) Fost. Disc. High. Tr. p. 188; 4 Bla. Com. p. 77; Hall. Const. Hist., 8th ed., vol. 1, pp. 9, 10.

(*g*) By the above statute some other acts are also declared to be treasonable, which have ceased to be so. It is still, however, treason to "slay the chancellor, treasurer, or the king's justices of the one bench or the other;" or to forge the great seal (11 Geo. 4 & 1 Will. 4, c. 66, s. 2).

(*h*) 'Misprision of treason' consists "in the bare knowledge and concealment of treason, without any degree of assent thereto:" 4 Bla. Com. p. 120.

same overt act, or one of them to one and the other of them to another overt act of the same treason," unless the party indicted and arraigned shall confess the same; this statute, however, does not extend to "cases of high treason in compassing or imagining the death of the king, and of misprision of such treason, where the overt act or overt acts of such treason which shall be alleged in the indictment for such offence shall be assassination or killing of the king, or any direct attempt against his life, or any direct attempt against his person whereby his life may be endangered or his person may suffer bodily harm;" but the individual indicted for any such offence as just specified shall be tried "in every respect and upon the like evidence" as if he stood charged with murder (*i*).

Again, by the 36 Geo. 3, c. 7, s. 1 (*k*), (so far as it remains unrepealed by the stat. 11 Vict. c. 12, s. 1) any person is declared to be guilty of treason who shall, "within the realm or without, compass, imagine, invent, devise, or intend death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint" of the heirs and successors of king George III., and "such compassings, imaginations, inventions, devices, or intentions, or any of them," shall "express, utter, or declare, by publishing any printing or writing, or by any overt act or deed, being legally convicted thereof upon the oaths of two lawful and credible witnesses."

Such are the statutory provisions now in force relating to treason, besides some others of much practical importance, to the details whereof allusion cannot however here be made, which concern the mode of procedure to be adopted

(*i*) 39 & 40 Geo. 3, c. 94, extended by 5 & 6 Vict. c. 51, s. 1.

(*k*) Made perpetual by 57 Geo. 3, c. 6.

in reference to this offence, or when an accused party is about to be put upon his trial for it (*l*). Confining my remarks then almost wholly to the first and most heinous of the several kinds of treason mentioned in the statute of Edward III., viz. where a man "doth *compass* (*m*) or *imagine*" the death of the sovereign, it is worthy of notice that an exception here presents itself to the doctrine laid down by Lord *Mansfield* in *Rex* v. *Scofield*, cited at a former page (*n*)—that the bare intent of an individual is not punishable by our law. But although in treason the substantive offence or corpus delicti is constituted by the mere secret intention of compassing the king's death, an overt act, though not essential to the abstract crime, is still essential to the offender's conviction, as he must, in the language of the Statute of Treasons, "be thereof proveably attainted of *open deed*." The statute in question, as observed by the Criminal Law Commissioners (*o*), has thus wisely provided that in this particular kind of treason, which manifestly tends to the most extensive public evil, the intention shall constitute the crime, but has at the same time, with equal wisdom and with a proper care for the safety of the accused, provided that the intention shall be manifested by some act tending towards the accomplishment of the criminal object; and this act must (save in cases falling within the operation of the stats. 39 & 40 Geo. 3, c. 94, and 5 & 6 Vict. c. 51, s. 1) be proved by two credible witnesses.

(*l*) See particularly the stats. 7 Ann. c. 21, s. 11; 7 & 8 Will. 3, c. 3; 20 Geo. 2, c. 30; 36 Geo. 3, c. 7, s. 5.

(*m*) The word 'compassing' or 'imagining,' signifies "the purpose or design of the mind or will, and not, as in common speech, the carrying such design to effect:" 4 Bla. Com. p. 78.

(*n*) Ante, p. 875.

(*o*) Cr. L. Com., 6th Rep., p. 4.

Such is the meaning of the maxim *voluntas reputatur pro facto* in connection with the crime of treason; an indictment for which offence, when belonging to that particular species now under notice, must charge that the defendant did "traitorously compass and imagine" the death of the sovereign, and then go on to allege overt acts as the means employed by the defendant for executing his traitorous purposes; for the compassing the death is considered as the treason, the overt acts as the means made use of to effectuate the intentions and imaginations of the heart (*p*), which, it has been further said (*q*), our law esteems "in the same degree of guilt as if carried into actual execution from the moment measures appear to have been taken to render them effectual." Hence, if conspirators meet together and consult how to kill the king, though they do not then fall upon any scheme for that purpose, this is an overt act of compassing his death, and "so are all means made use of, be it advice, persuasion, or command, to incite or encourage others to commit the fact or to join in the attempt." And any person who but assents to any overtures for that purpose will be involved in the same guilt (*q*). On like grounds, to provide weapons or ammunition for the purpose of killing or deposing the sovereign, is held to be a palpable overt act of treason in imagining his death (*r*). And "to conspire to imprison the king by force, and move towards it by assembling company, is an overt act of compassing the king's death, for all force used to the person of the king in its consequence may tend to his death, and is a strong pre-

Overt act—what.

(*p*) Fost. Disc. High. Tr., p. 194.
(*q*) Id. p. 195
(*r*) 4 Bla. Com. p. 79; *R.* v. *Hardy*, 1 East P. C. p. 60.

sumption of something worse intended than the present force, by such as have so far thrown off their bounden duty to their sovereign" (s). It seems also established, though doubts formerly existed upon the subject, that an offence within one branch of the statute of Edward III. may constitute an overt act of a different species of treason (t); and it is clear that an act in itself innocent may constitute an overt act of treason if it be done towards or in the course of executing a preconcerted treasonable scheme; thus, in *Lord Preston's case* (u), it was held, that the embarking on board a vessel in London, for the purpose of prosecuting a treasonable project abroad, was a sufficient overt act of treason.

Bare words, indeed, not relative to any act or design, would not suffice to constitute an overt act of treason, they are at the worst no more than bare indications of the malignity of the heart. Words, however, may safely be relied upon to explain the meaning of an act. Hence, where C., being beyond sea, said, "I will kill the king of England if I can come at him," and the indictment, after setting forth the above words, charged that C. came into England for the purpose indicated by them, it was held that C. might on proof of the above facts rightly be convicted of treason; for the traitorous intention evinced by the words uttered converted an action innocent in itself into an overt act of treason (v). The deliberate act of writing treasonable words is moreover to be regarded in a different light from a

(s) 4 Bla. Com p 79. See, however, in connection with the passage above cited, the remarks of Mr. Hallam, Const Hist, 8th edit, vol. 3, p 153

(t) Cr. L. Com, 6th Rep., p. 5

(u) 12 How. St. Tr. 727.

(v) Fost. Disc. High Tr. pp 200, 202.

mere uttering of them, and may constitute an overt act, for *scribere est agere;* but even in this case the bare words are not the treason (*w*). And the preponderance of authority is in favour of the rule that writings not published cannot constitute an overt act of treason (*x*).

In regard to the doctrine of constructive treason, it has been well observed by the Criminal Law Commissioners (*y*) that those clauses of the Statute of Treasons which declare it to be treason to compass and imagine the death of the sovereign, to levy war against him, or to adhere to his enemies, have been, at various periods of our history, fruitful sources of accusations, founded upon a technical and figurative construction of the words used in the Act totally different from their plain and obvious signification and inconsistent with the original design and application of the law. Thus, a riotous assembly meeting and attempting by force to redress a public grievance, to compel the repeal of a law, to pull down *all* inclosures, or to burn *all* meeting-houses, has been held to be treason as a levying of war against the king, though there were no direct intention or design whatever against the state or the person of the sovereign (*y*). This construction is said to be founded upon

(*w*) 4 Bla. Com. p. 80.

(*x*) Cr. L. Com., 6th Rep., p. 6.

Upon *Algernon Sidney's case,* 9 How. St. Tr. 818, Sir *M. Foster* (Disc. High Tr. p. 198) thus remarks: "In *Mr. Sidney's case,* it was said scribere est agere. This is undoubtedly true under proper limitations, but it was not applicable to his case. Writing, being a deliberate act and capable of satisfactory proof, certainly may, under some circumstances, *with publication,* be an overt act of treason; and I freely admit that, had the papers found in Mr. *Sidney's* closet been plainly relative to the other treasonable practices charged in the indictment, they might have been read in evidence against him, though not published." See also 4 Bla. Com., pp. 80, 81.

(*y*) 5th Rep. p. 91. See also 1 East P. C. pp. 66, et seq.; *Damma-*

the doctrine, that, by reason of the universality of the design, such acts and conduct amount to what in ancient times was called an "accroachment of royal power" (*z*), and constitute what Serjt. *Hawkins* describes (*a*) as an insolent invasion of the king's prerogative, "by attempting to do that by private authority which he by public justice ought to do."

In connection with what is here said, and whilst treating of offences against the sovereign, it may be proper to add, that, by the 3rd section of the stat. 11 & 12 Vict. c. 12, any person is declared guilty of felony who shall, "within the United Kingdom or without, compass, imagine, invent, devise, or intend, to deprive or depose our most gracious lady the Queen, her heirs or successors, from the style, honour, or royal name of the Imperial crown of the United Kingdom, or of any other of her Majesty's dominions;" or to levy war against her Majesty within any part of the United Kingdom, in order by force or constraint to compel her to change her counsels, or in order to put any force or constraint upon, or in order to intimidate or overawe either House of Parliament, or to move or stir any foreigner or stranger with force to invade the United Kingdom; "and such compassings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare, by publishing any printing or writing, or by open and advised speaking, or by any overt act or deed." And by sect. 7 of

ree's case, 15 How. St. Tr. 522; *R.* v. *Lord George Gordon*, Dougl. 590; *Reg.* v. *Frost*, 9 Car. & P. 129; *S. C.* 1 Towns. Mod. St. Tr., p. 1; *Reg.* v. *O'Brien*, Id. p. 469; *O'Brien* v. *Reg.*, 2 H. L. Cas. 465.

(*z*) See Hall. Const. Hist., 8th edit., vol. 3, p. 150.

(*a*) Hawk. P. C., Bk. 1, Chap. 17, s. 25. In treason, except where directed against the person of the Sovereign, the period of limitation is three years: 7 & 8 Will. 3, c. 3, ss. 5, 6.

the same Act an indictment for felony, framed under its provisions, will be valid, although the facts proved on the trial of the accused party shall amount in law to treason (*b*).

The 5 & 6 Vict. c. 51, s. 2, renders it a high misdemeanor to strike at the sovereign or to discharge fire arms near to her person with intent to alarm her Majesty.

Offences against the State—endangering the public safety.

Respecting offences against the State inferior in degree to treason, but having a tendency to occasion political hurt or detriment, a few general remarks must here suffice. Such offences may consist of specific acts inconsistent with the public safety,—as the seducing or endeavouring to seduce the subjects of the realm from their allegiance, or raising bodies of armed troops without lawful authority. Within this class may also be included all endeavours or attempts to perpetrate treason not actually amounting thereto; all endeavours to promote public disorder or disturbance, as by seditious meetings, libels, or conspiracies for the purpose of creating or inflaming discontent or exciting men to resort to violent and unconstitutional means for the redress of supposed grievances; various misprisions—which may be negative, as in the case of a bare concealment of treason, or positive, as contempts against the king's courts or his prerogative (*c*); also offences against religion—by blasphemous publications or otherwise.

(*b*) The period of limitation, in any such case as here provided for, is prescribed by the 4th sect. of the Act.

(*c*) Cr. L. Com., 6th Rep., pp. 17, 19; *Reg.* v. *O'Connor*, 5 Q. B. 16; *O'Connell* v. *Reg.*, 11 Cl. & F. 155.

Under the class of offences against the State, may properly be included the publishing of a libel on a foreign potentate, particularly when it has a tendency to interrupt the pacific relations existing between the two countries: *R.* v. *Peltier*, cited Holt on Libel, p. 78.

Conspiracy.

The crime of Conspiracy included in the above list of offences against the State is complete, where two or more than two agree to do an illegal thing, that is, either to effect something in itself unlawful—ex. gr. as being in violation of an Act of Parliament (*d*)—or to effect by unlawful means something which in itself may be indifferent or even lawful (*e*). "It has," remarked *Tindal*, C. J. (*f*), "always been held to be the law that the gist of the offence of conspiracy is the bare engagement and association to break the law, whether any act be done in pursuance thereof by the conspirators or not." Hence, in accordance with what has been just said, the agreeing of divers persons together to raise discontent and disaffection among the liege subjects of the Queen,—to stir up jealousies, hatred, and ill-will between different classes of her Majesty's subjects,—would clearly be indictable (*g*). So, the agreeing and conspiring together to cheat or defraud the government (*h*) or a private individual (*i*), or to obtain money by false pretences (*i*), or to extort money or goods, or falsely to accuse of any crime (*k*), or to obstruct, prevent, pervert, or defeat the course of public justice (*l*), constitutes an indictable

(*d*) See *Reg.* v. *Rowlands*, 2 Den. C. C. 364.

(*e*) Per *Tindal*, C. J., *O'Connell* v. *Reg.*, 11 Cl. & F. 233; *R.* v. *Seward*, 1 Ad. & E. 706; Per *Erle*, *J.*, *Reg.* v. *Carlisle*, 1 Dearsl. 341; *Reg.* v. *Mears*, 2 Den. C. C. 79.

(*f*) 11 Cl. & F. 233; Judgm. *Reg.* v. *Kenrick*, 5 Q. B. 61. See *Reg.* v. *Button*, 11 Q. B. 929.

(*g*) Per *Tindal*, C. J., 11 Cl. & F. 234; and see the indictment in *O'Connell's case*, as reported by Armstrong and Trevor, p. 9.

(*h*) *Reg.* v. *Thompson*, 16 Q. B. 832; *Reg.* v. *Blake*, 6 Q. B. 126.

(*i*) *Reg.* v. *Kenrick*, 5 Q. B. 49; *Reg.* v. *Gompertz*, 9 Q. B. 824; *Reg.* v. *Carlisle*, 1 Dearsl. 337; *Sydserff* v. *Reg.*, 11 Q. B. 245. See *Reg.* v. *Peck*, 9 Ad. & E. 686; *Reg.* v. *King*, 7 Q. B. 782.

(*k*) 4 Bla. Com. p. 136.

(*l*) 14 & 15 Vict. c. 100, s. 29; post, p. 910.

As to the action for conspiracy, see *Gregory* v. *Duke of Brunswick*, 1 Car. & K. 24.

misdemeanor. And a conspiracy to raise by false rumours the price of the public securities to the detriment of the king's subjects (*m*), or by falsehood to raise fictitiously the market value of shares in a railway or joint stock company, that the Queen's subjects may be deceived and injured, and that at their expense a profit may be made by the conspirators (*n*), would amount in law to a misdemeanor.

Offences against the Executive Power.

Under the general head of crimes against the State may further be included offences against the Executive Power, consisting (*o*)—1. In the unlawful refusal to take and execute any public office: 2. In unlawful omissions by officers or others to execute or discharge any official or other public duty, or in the negligent and imperfect execution or discharge of any such office or duty: 3. In disobedience of an Act of Parliament or of any lawful order or command emanating from a competent official authority,—an indictment will therefore lie for a refusal to comply with an order of justices for the payment of money (*p*), or of a Court of Quarter Sessions for the payment of costs (*q*): 4. In unlawfully resisting and obstructing the administration of the executive power: or in unlawful practices tending to obstruct, weaken, or corrupt its due administration—ex. gr., by the selling of offices or bribery,—which is defined to be the receiving or offering of any undue reward by or to any person whatsoever, whose ordinary profession

(*m*) *R.* v. *De Berenger*, 3 M. & S. 67; *R.* v. *Lord Cochrane*, Id. 10, n., as to which case, see the remarks of Lord *Brougham*, 2 H. L. Cas. 531-2; see, also, Towns. Mod. St. Tr. vol. 2, p. 10, where the above case is reported at length.

(*n*) Per Lord *Campbell*, *Burnes* v. *Pennell*, 2 H. L. Cas. 525.

(*o*) Cr. L. Com., 5th Rep., p. 16.

(*p*) *Reg.* v. *Ferrall*, 2 Den. C. C. 51; *Reg* v. *Brisby*, 1 Den. C. C. 416, *Reg.* v. *Bidwell*, Id. 222; *Reg.* v. *Dale*, 1 Dearsl. 37.

(*q*) *Reg.* v. *Mortlock*, 7 Q. B. 459, *Reg.* v. *Stamper*, 1 Q. B. 119

or business relates to the administration of public justice, in order to influence his behaviour in office, and incline him to do anything against the known rules of honesty and integrity (*r*). The definition here given, however, in limiting the offence of bribery to the offer or acceptance of rewards by officers connected with the administration of justice, is clearly too narrow (*s*).

Lastly, under the head of offences against the executive power must be included abuses of official authority by exercising it partially, corruptly, or oppressively, for instance by extortion (*t*), committed colore officii, or by embezzlement or other fraudulent application of public funds, or by the betraying matter of confidence, or by the taking of bribes, or by the illegal sale of an office or appointment (*u*).

Offences against the Administration of Justice.

Offences against the Administration of Public Justice are divisible into offences committed by officers of justice, judicial or ministerial, who neglect their duty or abuse the authority with which they are invested, and those committed by private persons.

—by judicial officers

A judge who maliciously obstructs the course of justice is guilty of a misdemeanor (*v*), and it is a familiar principle that every Court of justice is bound to take care that its process shall not be abused for purposes of injustice, nor its authority be deliberately perverted to bad and wicked

(*r*) Hawk. P. C., Bk. 1, Chap. 67, s. 2; Russ. Cr., 3rd edit., vol. 1, p. 154; 3 Inst. 147.

(*s*) See *R.* v. *Vaughan*, 4 Burr. 2494; *R.* v. *Beale*, cited 1 East, 183.

(*t*) *Douglas* v. *Reg.*, 13 Q. B. 74; *S. C.* Id. 42; *Re Douglas*, 3 Q. B. 825.

(*u*) *Reg.* v. *Charretie*, 13 Q. B. 447.

(*v*) Per Lord *Campbell*, C. J., *Reg.* v. *Marshall*, 4 E. & B. 480. See *Ex parte Ramshay*, 18 Q. B. 173.

ends (*x*),—as by the compounding of a charge of felony, or, in certain cases, of misdemeanor (*y*).

—by private persons.

Offences by private persons against the administration of justice may consist in resistance to the execution of such official duties as are strictly essential or ancillary thereto, and particularly in resistance to ministers of justice acting in the discharge of their proper functions, in escapes from lawful custody; and in aiding others to escape (*z*), or in rescuing them therefrom; or in hindering a witness from appearing to give evidence in a Court of justice (*a*); or in perjury, which, by the common law (*b*), may be defined to be the assertion of a falsehood upon oath in a judicial proceeding respecting some fact material thereto (*c*) or to the point to be decided in such proceeding (*d*); the characteristic of this offence being not the violation of the religious obligation of an oath, but the injury done to the administration of public justice by false testimony. For "the law takes no notice of any perjury but such as is committed in some Court of justice having power to administer an oath, or before some magistrate or proper officer invested with a similar authority, in some proceeding relative to a civil suit or a criminal pro-

(*x*) Per *Coleridge*, J., *Reg.* v. *Alleyne*, 1 Dearsl. 510; *S. C.* 4 E. & B 186.

(*y*) See *Reg.* v. *Alleyne*, 1 Dearsl. 505; *Keir* v. *Leeman*, 9 Q. B. 371, 395; *S. C.*, 6 Q. B. 308; *Goodall* v. *Lowndes*, 6 Q. B. 464; and cases cited, ante, pp. 289, 367; *Reg.* v. *Pascoe*, 1 Den. C. C. 456.

(*z*) *Holloway* v. *Reg.*, 17 Q B. 317.

(*a*) *Reg.* v. *Stowell*, 5 Q. B. 44.

(*b*) False swearing is also in various cases punishable by the statute law: see Arch. Cr. Pl, 12th edit., p. 661.

(*c*) See per *Maule*, J., *Reg.* v. *Phillpotts*, 2 Den. C. C. 306.

(*d*) Cr. L. Com., 5th Rep. p. 23. See *Lavey* v. *Reg.*, 2 Den. C. C. 504, (*S. C.*, 17 Q.B. 496); *Reg.* v. *Phillpotts*, Id. 302; *Reg.* v. *Cooke*, Id. 462; *Reg.* v. *Millard*, 1 Dearsl. 166; *Reg.* v. *Stone*, 1 Dearsl. 251; *King* v. *Reg*, 14 Q.B. 31; *Reg.* v *Chapman*, 1 Den C. C. 432.

secution" (*e*); it esteems all other oaths unnecessary at least, and therefore will not punish the breach of them (*f*).

Offences against the Public Peace.

An offence against the Public Peace may be constituted by an actual or by a constructive breach of the peace, *sc.*, by some act—as the sending of a challenge or a threatening letter—having a tendency to make others break the peace.

Riots, &c.

Of actual breaches of the peace, the more important are riots, routs, unlawful assemblies, and forcible entries upon land, and in regard to these our legislature has at various times deemed it expedient to enact specific ordinances.

"Riots, routs, and unlawful assemblies," remarks Blackstone (*g*), "must have three persons at least to constitute them. An *unlawful assembly* is when three or more do assemble themselves together to do an unlawful act, as to pull down inclosures, to destroy a warren or the game therein; and part without doing it or making any motion towards it. A *rout* is where three or more meet to do an unlawful act upon a common quarrel, as forcibly breaking down fences upon a right claimed of common or of way; and make some advances towards it. A *riot* is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel: as if they beat a man; or hunt and kill game in another's park, chase, warren, or liberty; or do any other unlawful act with force and violence; or even do a lawful act, as removing a nuisance, in a violent and tumultuous manner." Now it is material to observe that by our common law the injury or grievance complained

(*e*) 4 Bla. Com. p. 137.
(*f*) Id. ibid.
(*g*) 4 Com. p. 146; Hawk. P. C., Bk 1, Chap. 65.

of and intended to be remedied by those who are parties to a riot, rout, or unlawful assembly, must be private, or, at all events, must concern a limited class only. In reference to this point, indeed, it is noticeable that the Statute of Treasons (*h*) declares that if "any man ride openly or secretly, with men of arms, against any other to slay or to rob him, and to take and keep him till he make fine for his deliverance, it is not the mind of the king nor his counsel that in such case it shall be judged treason; but it shall be judged felony or trespass according to the laws of the land of olden time used, and according as the case requireth." Upon which Sir M. Foster remarks (*i*) that the cases of assembling to kill, rob, or imprison *are put by way of example only*, and will not exclude others which may be brought within the same rule, that is, all cases which are of the like *private* nature (*k*).

Riot Act.

With a view to preventing tumults and riotous assemblies, and for the more speedy and effectual punishment of rioters, the statute 1 Geo. 1, st. 2, c. 5, (usually called the Riot Act), by reason of the proved inefficacy of various prior enactments, was passed; its general effect (*l*) is to provide "that if any twelve persons are unlawfully assembled to the disturbance of the peace, and any one justice of the peace, sheriff, under-sheriff, or mayor of a town, shall think proper to command them by proclamation (*m*) to disperse, if they contemn his orders and continue together for one

(*h*) Ante, p. 899.

(*i*) Disc. High Tr. p. 209.

(*k*) Cr. L. Com., 5th Rep., pp. 90, 91.

(*l*) See 4 Bla. Com p. 143, *R.* v. *James*, 5 Car. & P. 153.

(*m*) Of which a form is given in the Act (sect. 2). See *R.* v. *Child*, 4 Car & P. 442.

hour afterwards, such contempt shall be felony." And, further, if the reading of the proclamation be by force opposed, or the reader be in any manner wilfully hindered from the reading of it, such opposers and hinderers, and all persons to whom such proclamation *ought to have been made*, and knowing of such hindrance and not dispersing, are likewise declared to be guilty of felony, which, on conviction, is now punishable by transportation or imprisonment at the discretion of the Court (*n*).

Likewise, by the 7 & 8 Geo. 4, c. 30, s. 8 (*o*), it is enacted that if any persons, *riotously* (*p*) and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force demolish, pull down, or destroy, or *begin* (*q*) to demolish, pull down, or destroy any church or chapel, or any house or building used in carrying on any trade or manufacture, or any machinery, &c., they shall be guilty of felony (*r*).

Forcible entry.

Another offence against the public peace consists in a *forcible entry* or *detainer*, i. e., where possession is taken or kept of either house or land, with such number of persons and show of force as is calculated to prevent resistance and to deter the rightful owner from repelling the wrongdoers and resuming his own possession (*s*). In ancient

(*n*) 7 Will. 4 & 1 Vict. c. 91, s. 1.

The duty of a magistrate in regard to the quelling of a riot is explained at length by *Littledale*, J., in *R.* v. *Pinney*, 5 Car. & P. 254; and see *R.* v. *Kennett*, Id. 282, n.

(*o*) As to the offence hereby constituted, see *Reg.* v. *Howell*, 9 Car. & P. 437; *Reg.* v. *Harris*, Car. & M. 661; *Reg.* v. *Simpson*, Id. 669.

(*p*) See *Reg.* v. *Langford*, Car. & M. 602.

(*q*) See *Reg.* v. *Howell*, 9 Car. & P. 437; *Reg.* v. *Adams*, Car. & M. 299; *R.* v. *Thomas*, 4 Car. & P. 237; *R.* v. *Price*, 5 Car. & P. 510.

(*r*) Which is punishable by transportation or imprisonment: 4 & 5 Vict. c 56, s. 2; 6 & 7 Vict. c. 10, s 1.

(*s*) Per Lord *Tenterden*, C. J.,

times, remarks Lord *Denman*, C. J. (*t*), violent acts were frequently committed in taking possession of property, sometimes by those who were really the owners of the property, sometimes by those who were not. To meet this mischief various statutes (*u*) were passed, giving "a great and indeed violent power to the magistrates;" for it is thereby provided, that, upon any forcible entry or forcible detainer after peaceable entry into any lands, one or more justices of the peace, taking sufficient power of the county, may go to the place at which the offence was committed, and there "record the force upon his own view as in case of riots, and upon such conviction may commit the offender to gaol till he makes fine and ransom to the king" (*x*). The justice moreover is empowered by the statutes in question to summon a jury to try the forcible entry or detainer complained of; and, if the same be found by that jury, restitution of possession may be made, without inquiry into the merits of the title being instituted (*x*). The same object may likewise be effected by indictment preferred at the assizes—where, on the finding of the bill by the grand jury, it is discretionary with the judge of assize, on ground shewn by affidavit, to grant a warrant of restitution (*y*). The proceeding under the statutes of forcible entry is thus peculiar, and has been said to furnish "the only instance known to the law of England in which a party may be turned out of possession by ex parte steps taken" (*z*). It may be well to add, that a

Milner v. *Maclean*, 2 Car. & P. 18; and in *R.* v. *Smyth*, 5 Car. & P. 204.

(*t*) *R.* v. *Harland*, 8 Ad. & E. 828.

(*u*) 15 Ric. 2, c. 2; 8 Hen. 6, c. 9; 31 Eliz. c. 11; 21 Jac. 1, c. 15.

(*x*) 4 Bla. Com. p. 148; Arch. Just. P., 4th edit., vol. 1, pp. 464—474; *R.* v *Wilson*, 3 Ad. & E. 817; *R.* v. *Oakley*, 4 B. & Ad. 307.

(*y*) *R.* v. *Harland*, 8 Ad. & E. 826.

(*z*) Per Lord *Denman*, C. J., 8 Ad. & E. 829.

forcible entry is also indictable at common law; although a mere trespass to land, remediable by civil action, is not so (*a*).

Amongst offences against the public peace may further properly be included assault and battery, which will however be more conveniently noticed in the ensuing chapter (*b*); and next in order must be mentioned offences against the Public Revenue and Trade—as smuggling and fraudulent bankruptcy (*c*)—and offences against the Public Morals, Health, and Police, comprising, inter alia, bigamy (*d*), infringements of the game laws, and nuisance, respecting which latter only will some few remarks be here offered.

Offences against public trade:

or against public morals and police.

A common nuisance, observes Blackstone (*e*), is an offence "against the public order and œconomical regimen of the state, being either the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires;" the true nature of a common or public nuisance, and the test whereby to distinguish it from a private nuisance having been already pointed out (*f*), I need here only remind the student that common nuisances are such inconvenient or troublesome offences as annoy the whole community in general, and not merely some particular person or persons, and therefore, with a view to avoid multiplicity of suits, are indictable only and not actionable. Of this nature are annoyances in highways and public rivers, by rendering the same inconvenient

Nuisance.

(*a*) Per Lord *Kenyon*, C. J., *R.* v. *Wilson*, 8 T. R. 360; *R.* v. *Blake*, 3 Burr. 1731.

(*b*) Sect. 1.

(*c*) See the stat. 12 & 13 Vict. c. 106, ss. 251—253.

(*d*) See the stat. 9 Geo. 4, c. 31, s. 22.

(*e*) 4 Com. p. 166.

(*f*) Ante, pp. 719, 789.

or dangerous to pass, either positively by actual obstruction, or negatively by want of reparation (*g*). For which public nuisance the person so obstructing, or the individual bound to repair, or the parish at large in which the obstruction has occurred or want of reparation has been tolerated, may, according to circumstances, be indicted (*h*). The proper and ordinary (*i*) remedy, then, for obstruction of a public highway, whether by land or water, being by indictment (*j*), difficult questions not unfrequently arise in determining whether the road or river obstructed *is* public, and whether the obstruction proved is such as may amount to a nuisance at common law. In reference to the former of these points, the cases below cited may be consulted (*k*). With reference to the latter it must be remembered, that, although even a small offence cannot legally be committed (*l*), yet the consequences of an obstruction of a public thoroughfare or navigable river may be "so slight, uncertain, and rare" as not to entail on the offending party criminal responsibility (*m*); the question, however, whether a particular erection is or is not *commune nocumentum* (*n*), being in any given case for the jury (*o*).

Besides nuisances of the kind above specified, we have

(*g*) 4 Bla. Com. p. 167.

(*h*) See Gibbons' Law of Nuisances &c., 2nd edit., pp. 326 et seq.; *Reg.* v. *Inhabitants of Hornsea*, 1 Dearsl. 291.

(*i*) There are many nuisances for which, under particular statutes, as Highway or Building Acts, proceedings may be taken before justices of the peace: Gibbons' Law of Nuis., &c., 2nd edit., p. 408.

(*j*) Judgm., *Mayor of Colchester* v. *Brooke*, 7 Q. B. 377.

(*k*) *R.* v. *Richards*, 8 T. R. 634; *Reg.* v. *Betts*, 16 Q. B. 1022; *Reg.* v. *Petrie*, (Q. B.) 19 Jur. 752.

(*l*) Per Lord *Campbell*, C. J., *Reg.* v. *Russell*, 3 E. & B. 952.

(*m*) *R.* v. *Tindall*, 6 Ad. & E. 143; per *Crompton*, J., 3 E. & B. 953. See *Reg.* v. *Charlesworth*, 16 Q. B. 1012; *R.* v. *Ward*, 4 Ad. & E. 384.

(*n*) See *Reg.* v. *Vann*, 2 Den. C. C. 325.

(*o*) *Reg.* v. *Betts*, 16 Q. B. 1022, 1038.

already seen that the carrying on of an offensive trade or manufacture is, when detrimental to the public, punishable by criminal prosecution. The creation or continuance of such a nuisance may, further, subject the individual who has created or continues it to the stringent provisions of the Public Health and Nuisances Removal Acts (*p*).

(*p*) The Acts above alluded to are numerous: see 11 & 12 Vict. c. 63, and c. 123; 12 & 13 Vict. c. 111; 13 & 14 Vict. c. 52; 15 & 16 Vict. c. 85; 16 & 17 Vict. c. 128; 17 & 18 Vict. c. 95; 18 & 19 Vict. cc. 115, 116, 121. And see *Reg.* v. *Harden*, 2 E. & B. 188.

CHAPTER III.

OF OFFENCES AGAINST INDIVIDUALS.

THE present Chapter will be devoted to a brief inquiry respecting certain criminal acts directed against the Person, Reputation, and Property of individuals—of which will more particularly be considered the various species of Homicide —Assault—Libel; Larceny, whether simple or aggravated, and some kindred offences.

SECT. I.—*Of Offences against the Person and Reputation.*

Homicide—degrees of.

The Law of England recognises (independently of the crime of suicide) two degrees of culpable homicide, *murder* and *manslaughter:* it recognises also two degrees of homicide—*excusable* and *justifiable*—which do not expose to punishment.

Murder.

'Murder' is constituted by the killing of any person under the king's peace *with malice aforethought* express or implied (*a*).

Manslaughter.

'Manslaughter' may properly be defined to be "the felonious killing of another *without malice* express or implied" (*b*), so that this offence differs from murder not in "substance of the fact" (*c*), but in degree; and whereas the indictment for murder charges that the prisoner did, on a day named, "feloniously, wilfully, and of his malice

(*a*) 1 Russ Cr. 3rd ed. p. 482; 4 Bla. Com p. 195; 3 Inst. 47; 9 Geo. 4, c. 31, s. 3.

(*b*) See 1 Hale P. C. p. 449.

(*c*) 1 Hale P. C p. 466

aforethought, kill and murder" the deceased, the indictment for manslaughter charges merely that he did "feloniously kill and slay" the deceased (*d*).

Malice express or implied.

The peculiar characteristic of murder, then, as distinguished from manslaughter, is the ingredient in it of malice, either express or implied; the nature of express malice may be illustrated by the case where one person kills another with a deliberate mind and formed design—such design being evidenced by external circumstances discovering the inward intention (*e*)—as, for instance, in the case of duelling, which, if it end fatally, is punishable as murder (*f*). Implied malice is malice, inferred or presumed by law from any deliberately cruel act committed by one person against another. Thus, if a man kills another suddenly without any, or indeed without some considerable, provocation, the law implies malice, because "no person, unless of an abandoned heart, would be guilty of such an act upon a slight or no apparent cause" (*g*); and if A. lays poison for B., which is taken by C., against whom A. had no malicious intent whatever, the individual last named will clearly be guilty of murder (*g*). So if a man throw himself into a river under such circumstances as render the act not voluntary on his part, as if violence be used to the body or threats which operate on the mind, he is guilty of murder who drove deceased to the act which caused his death, i. e., provided the apprehension were of immediate violence and apparently well founded (*h*). So, if two persons mutually agree to commit suicide to-

(*d*) See Mr. Greaves's edit. of Lord Campbell's Acts, p. 86; 14 & 15 Vict. c. 100, s. 4.

(*e*) 1 Hale P. C. p. 451.

(*f*) *Reg.* v. *Barronet*, 1 Dearsl. 51; *Reg.* v. *Cuddy*, 1 Car. & K. 210; 4 Bla. Com. p. 199. See *Helsham* v. *Blackwood*, 11 C. B. 111.

(*g*) 4 Bla. Com. p. 200.

(*h*) Per *Erskine*, J., *Reg.* v. *Pitts*, Car. & M. 284; *R.* v. *Evans*, cited 1 Russ. Cr., 3rd ed., p. 489.

gether, and the means employed to produce death take effect upon one only, the survivor will, in point of law, be guilty of murder (*i*). And if an individual do any act with regard to a human being, helpless and unable to provide for itself, which must necessarily lead to its death, the crime amounts to murder. But if the circumstances were not such that the parties must have been aware that the result would be death, the offence would be reduced to manslaughter, provided the death was occasioned by an unlawful act, but not such as to imply a malicious mind. For instance, if a person leaves a child at a man's door where it is likely to be found almost immediately and taken care of, it would be too much to say that if the child's death were thence to ensue, the act done would amount to murder. If, on the other hand, it were left in an unfrequented place, on a barren heath, for instance, what inference could be drawn but that the party left it there in order that it might die (*k*)?

Malice, then, in general, may be said to denote "a wicked, perverse, and incorrigible disposition" (*l*), and to emanate from "a heart regardless of social duty and fatally bent upon mischief" (*m*); the term 'malice aforethought' being however sometimes applied to a state of circumstances involving only malice in a legal sense, and where malice according to the ordinary signification of the word does not exist (*n*).

(*i*) *Reg.* v. *Alison*, 8 Car. & P. 418; *R* v. *Dyson*, Russ. & Ry. 523. See *R* v. *Russell*, 1 Mood. C. C. 356.

(*k*) Per *Coltman*, J., *Reg* v. *Walters*, Car. & M. 164; *Reg.* v. *Waters*, 2 Car. & K. 864; *Reg.* v. *Chandler*, 1 Dearsl. 453.

(*l*) Fost. Disc. Hom. p. 257; *Mason's case*, Id 132; *Reg.* v. *Tivey*, 1 Den. C. C. 63; *Reg.* v. *Cluderay*, 1 Den. C. C. 514.

(*m*) Fost. Disc. Hom. p. 257.

(*n*) Cr. L. Com., 4th Rep., p. 22. Per Lord *Denman*, C.J. *Reg.* v. *Tyler*, 8 Car. & P. 620.

Now it is a very important rule of our law that all homicide is presumed to be malicious, until the contrary is shewn (*o*), so that any homicide will, in legal contemplation, amount to murder, unless where justified by the command or permission of the law—excused on the ground of accident or because done in self-preservation,—or alleviated into manslaughter by concomitant circumstances (*p*). And where the question arises whether a homicide was committed wilfully and maliciously or under circumstances justifying, excusing, or alleviating it, the solution of the question,—are the facts alleged by way of justification, excuse, or alleviation, true? is the proper and only province of the jury. But whether, the truth of the facts being assumed, such homicide be justified, excused, or alleviated, must be submitted to the judgment of the Court; in cases of doubt and difficulty, the jury having a right to state facts and circumstances in a special verdict, and, where the law is clear, being directed by the Judge in regard to it—matters of fact being still left to their determination (*q*).

Precisely in accordance with the terms in which the above important legal presumption respecting homicide has been stated, is the summing up of *Tindal*, C. J., in *Reg.* v. *Greenacre* (*r*), in the course whereof he remarks, that, "where it appears that one person's death has been occasioned by the hand of another, it behoves that other to shew from evidence, or by inference from the circumstances of the case, that the offence is of a mitigated character and does not amount to the crime of murder." And in *Reg.* v.

(*o*) 4 Bla. Com. p. 201; Fost. Disc. Hom. p. 255; 1 Russ. Cr., 3rd ed., p. 483.

(*p*) 4 Bla. Com. p. 201.

(*q*) Fost. Disc. Hom. pp. 255, 256; Arch. Cr. Pl., 12th ed., p. 145.

(*r*) 8 Car. & P. 35, 42.

Kelly (*s*), *Rolfe*, B., observes that "primâ facie, when any man takes away the life of another, the law presumes that he did it of malice aforethought, unless there be evidence to shew the contrary," i. e., to reduce the killing to manslaughter, or to one or other of the inferior species of homicide (*t*).

Various states of facts might readily be suggested which would suffice thus to mitigate the character of homicide. It will, in the first instance, be advisable however to observe, that the essential distinctions between culpable homicide and such as is justifiable or excusable, as also between the two degrees of culpable homicide, will be found necessarily to depend upon the following considerations, viz. the mind and intention of the party in doing the act which caused death—the particular occasion of the act and circumstances attending it—collateral grounds of legal policy (*u*).

Homicide on provocation.

A case frequently occurring in practice, which raises difficulty in distinguishing between the legal degrees of guilt attaching to homicide, is where, some degree of provocation having been offered, the question is whether the homicide shall be accounted murder, or shall be regarded as extenuated by provocation given and as amounting to manslaughter only. The law, indeed, whilst making allowance for the infirmity of man's temper, ordains that a ferocious excess of violence, far beyond what the particular provocation called for, and which therefore cannot be attributed to mere heat and passion so momentarily excited, shall not be held justifiable, but shall be accounted murder; it does not, however, attempt to define generally in what circumstances such

(*s*) 2 Car. & K. 814.

(*t*) Per *Park*, J., *Reg.* v. *Fisher*, 8 Car. & P. 185.

(*u*) Cr. L. Com., 4th Rep., p. 19.

excess shall be deemed to consist, or to lay down any precise test by which the existence of 'malice aforethought,' which we have seen to be an essential ingredient in the crime of murder, may, in any conceivable case, be affirmed or negatived. If, upon a slight blow given, the party struck returned a moderate blow not likely to prove fatal, and death ensued, these facts would clearly not justify a conviction for murder. If, in a similar case, the offended party were for a great length of time to continue his blows and not to desist until he had ascertained that life was extinguished, it might thence be easily inferred that the death resulted not from any sudden heat and passion caused by the original provocation, but that the excess was attributable only to a deliberate intention to kill (*x*). Nevertheless, between the two extreme cases here put, intermediate cases may arise in which the determination of perplexing questions of fact may, subject to judicial comments and advice, be cast upon the jury.

In every case of homicide upon provocation, observes Sir M. Foster (*y*), how great soever it be, if there is sufficient time for passion to subside and for reason to interpose, such homicide will be murder; whereas, if the fatal blow be struck in heat of blood, and without circumstances importing malice, the homicide will be manslaughter. No mere provocation, however, can reduce homicide in degree below manslaughter. So that, although, if a man were to kill another suddenly without provocation, the act would amount to murder, yet, if the provocation were great and the retaliation immediate, the killing would be manslaugh-

(*x*) The substance of the above remarks is taken from the Cr. L. Com., 4th Rep., p. 25.

(*y*) Disc. Hom. pp. 295, 296; *R.* v. *Thomas*, 7 Car. & P. 817.

ter only (*z*). If a person receives a blow and immediately avenges it with any instrument which he may happen to have in his hand, then the offence will be only manslaughter, provided the stroke is to be attributed to anger arising from the previous provocation. But in dealing thus leniently with an offender, our law requires two things: 1st, that there should be sufficient provocation; and 2ndly, that the fatal stroke should be clearly traceable to the influence of passion arising from it. If a person denotes, by the manner in which he avenges a previous blow, that he is not excited by a sudden transport of passion, but is acting under the influence of that wicked disposition which the law terms 'malice' in the definition of wilful murder, then the offence would not be manslaughter but murder (*a*). A. uses provoking language or behaviour towards B., and B. strikes him, whereupon a combat ensues, in which A. is killed; B. is guilty of manslaughter, for the affray was sudden, the parties fought upon equal terms, and in such combats, upon sudden quarrels, it matters not who gave the first blow (*b*). But if B. had drawn his sword and made a pass at A., whose sword was undrawn, and thereupon A. had drawn, and a combat had ensued in which A. had been killed, this would have been murder: for B., by making his pass whilst his adversary's sword was undrawn, evinced malice; and A.'s endeavour to defend himself, which he had a right to do, will not excuse B. (*b*). No provocation by words or gestures only will indeed suffice to reduce the crime of murder to that of manslaughter (*c*); nor, as already stated, will every

(*z*) Arch. Cr. Pl., 12th ed., p. 503.

(*a*) Per *Parke*, B., *R.* v. *Thomas*, 7 Car. & P. 817; *R.* v. *Hayward*, 6 Id. 157; *R.* v. *Lynch*, 5 Id. 324; *Reg.* v *Kirkham*, 8 Id. 115.

(*b*) Fost. Disc. Hom. p. 295; *R.* v *Mawgridge*, Kel. 128.

(*c*) Fost. Disc. Hom. p. 290.

provocation by blows avail to do so, particularly when the prisoner appears to have resented them by using a weapon calculated to cause death. If, however, there be a provocation by blows which would not of itself render the killing manslaughter, but which is accompanied by insulting words and gestures calculated to produce a degree of exasperation equal to that which would be caused by a violent blow, the law would probably regard such special circumstances as reducing the crime of homicide to that of manslaughter (*d*).

Struggles in anger.

Again—all struggles in anger, whether by fighting, wrestling, or otherwise, are unlawful (*e*); so that if death result to one of the parties engaged in such contest, the individual causing it will be guilty certainly of manslaughter, and perhaps even of murder. "When," observes *Bayley*, J., (*f*), "persons fight on fair terms, and merely with fists, where life is not likely to be at hazard, and the blows passing between them are not likely to occasion death, if death ensues, it is manslaughter; and if persons meet originally on fair terms, and, after an interval, blows having been given, a party draws, in the heat of blood, a deadly instrument and inflicts a deadly injury, it is manslaughter only. But if a party enters a contest, dangerously armed, and fights under an unfair advantage, though mutual blows pass, it is not manslaughter but murder."

Homicide

There is one peculiar rule of our law, with regard to

(*d*) Per *Pollock*, C. B., *Reg.* v. *Sherwood*, 1 Car. & K. 556.

(*e*) *Reg.* v. *Canniff*, 9 Car. & P. 359.

(*f*) *R.* v. *Whitcley*, 1 Lew. C. C. 175-6.

Persons present at and sanctioning a prize-fight which ends fatally are indictable for manslaughter: *R.* v. *Murphy*, 6 Car. & P. 103; *R.* v. *Hargrave*, 5 Id. 170; *R.* v. *Perkins*, 4 Id. 537.

coupled with a felonious intention.

homicide, which requires to be noticed, whereby a felonious purpose, though it be wholly unconnected with any design to occasion death, is made, in conjunction with an accidental killing, to constitute the crime of wilful murder. Thus, if an individual, shooting at a fowl with an intention to steal it, which intention must be collected from the attendant circumstances, by pure accident kill a person not even known by him to be near, the felonious intent in shooting at the fowl, when coupled with the fact of a man being so killed, renders the individual committing this act legally guilty of the crime of murder (*g*); though if the shooting were done wantonly and without any felonious intention, the act done would barely amount to manslaughter (*h*).

Homicide caused by undue correction.

Even where the act upon which death ensues is lawful or innocent, it must be done in a proper manner and with due caution to prevent mischief, in order that the individual thus causing the death of another may be held excused. Thus parents, masters, and others having authority in foro domestico, may give reasonable correction to those under their care, and if death thence result, without their fault, it will be regarded as accidental. But if the chastisement inflicted exceed the bounds of due moderation, either in degree or in respect of the instrument used, the homicide thus committed will be murder or manslaughter, according to the circumstances of the case. If a schoolmaster correct his scholar with a cudgel or other thing not likely to kill, though improper for the purpose of correction, he will, if death ensue, be amenable to a charge of manslaughter—if

(*g*) Fost. Disc. Hom. pp. 258, 259; Cr. L. Com., 1st Rep., pp. 40-1; Russ. Cr., 3rd ed., vol. 1, p. 540.

(*h*) Fost. Disc. Hom., p. 259

with a dangerous weapon likely to kill or maim, due regard being had to the age and strength of either party, he may be answerable for murder (*i*); for the using of a weapon from which death is likely to ensue imports a mischievous disposition, and the law accordingly implies that a degree of malice attended the act, which, if death result from it, will be murder (*k*).

Homicide through negligence.

Further, it is obvious that a person "may be culpable, either in the doing of an act rashly without knowing its nature or probable consequences, or in the careless and incautious manner of doing it. In the former predicament are all cases where a person unacquainted with the effect of a powerful medicine or drug administers it to another; or where a person rashly and improvidently presents a gun at another and draws the trigger, not supposing it to be loaded, when it is in truth loaded, and death results" (*l*). And as a general rule deducible from decided cases, it may be laid down that where death is caused by negligence without malice, the person guilty of such negligence will be indictable for manslaughter (*m*). If, indeed, a workman employed in the repair of a building, throws stones or rubbish from the house-top, and thereby kills an individual passing underneath, this act will, in the eye of the law, amount to murder, manslaughter, or excusable homicide, according to the degree of precaution taken and the necessity for taking it. If the act were done, without any kind of warning, in a public street, at a time when persons were usually passing, this might be esteemed murder—if at a time when persons

(*i*) Fost. Disc. Hom. p. 262; Per *Holt*, C. J., *R.* v. *Keite*, 1 Ld. Raym. 144.

(*k*) Per *Nares*, J., *R.* v. *Wiggs*, 1 Leach C. C. 378, n.

(*l*) Cr. L. Com., 7th Rep., p. 26.

(*m*) *Reg.* v. *Swindall*, 2 Car. & K. 230; *Reg.* v. *Lowe*, 3 Car. & K. 123.

were not likely to be passing, it would be manslaughter: if done in a retired spot where no persons were in the habit of passing, it would be homicide by misadventure (*n*). So, if a person, riding through a street slowly, and using reasonable caution to prevent mischief, rides over and kills a child which is heedlessly crossing the road, the result is purely accidental; but if he had used such speed as under the circumstances was not unlikely to occasion accident, the want of caution might render him amenable to a charge of manslaughter; and were he to ride into the midst of a crowd at so furious a rate as that loss of life was likely thence to ensue and did ensue, he might, by his wilful endangering of life, be guilty of the crime of murder (*o*).

Homicide caused by negligence—of medical practitioner.

With reference also to negligent treatment by medical practitioners, it has been observed (*p*), that if a medical or any other man cause the death of another intentionally, that, of course, will be murder; but where a person, not intending to kill a man, by his gross negligence, unskilfulness, and ignorance, causes death, he is guilty of culpable homicide. If, therefore, an operation, which results in the death of the patient, be performed by one whether duly qualified or not to act as a surgeon, the questions for the jury will be, first, whether the deceased died from the effects of the operation performed on him by the accused; secondly, whether the treatment pursued by the prisoner towards the deceased was marked by negligence, unskilfulness, and ignorance.

(*n*) See Arch. Cr. Pl., 12th edit., p. 508, and the authorities there cited.

(*o*) Cr. L. Com., 7th Rep., p. 26.

(*p*) Per *Maule*, J., *Reg.* v. *Whitehead*, 3 Car. & K. 202, 204. See *R.* v. *Long*, 4 Car. & P. 423; *R.* v. *Webb*, 1 M. & Rob. 405: *R.* v. *Spilling*, 2 M. & Rob. 107; *R.* v. *Van Butchell*, 3 Car. & P. 629.

—of trustees of road, &c.

But although the neglect of a personal duty, when death ensues as the consequence of such neglect, renders the guilty party liable to an indictment for manslaughter, this proposition holds true only where the neglect is personal, and the death was the immediate result of that personal neglect. Trustees, therefore, appointed to repair roads, under a local Act, are not chargeable with manslaughter, if a person using one of such roads is accidentally killed, in consequence of the road being out of repair, through neglect of the trustees to contract for its due reparation (*q*). "In all the cases," remarks *Erle*, J. (*r*), "in which a party has been indicted for manslaughter, in causing death by his omission to perform a particular duty, I think the neglect of duty was immediately connected with the death, as in the case of careless driving on a railway, or of not supplying an infant with food. The present case does not fall within this class."

Homicide in resisting officers of justice.

Let us now turn, for a moment, to the consideration of another class of cases, viz. where homicide occurs in the course of resistance offered to the enforcement of public justice. Policy, or rather necessity, obviously requires that every minister of justice should be protected, not only in executing any express sentence of the law, but also in doing every act which the law obliges him to do in the administration and advancement of justice. This principle, which is essential to the existence of the law as an imperative rule of conduct (*s*), extends also to the protection of all who either lawfully assist ministers of justice in executing their duties, or who, being mere private persons, legally execute

(*q*) *Reg.* v. *Pocock*, 17 Q. B. 34. (*r*) Id 39. (*s*) Ante, p. 865.

such powers as the law casts upon them, for the advancement of justice and the prevention of wrong (*t*). Hence, where persons having authority to arrest or imprison, and using the proper means for that purpose, are resisted in so doing, and the party making resistance is killed in the struggle, this homicide is justifiable. On the other hand, if the party having authority to arrest or imprison, using the proper means, happens to be killed, all who take a part in such resistance will be guilty of murder (*u*).

Where a defendant in a civil suit, being apprehensive of an arrest, flies from the officer of justice, who, in pursuing, kills him, this homicide may amount to murder or manslaughter, according to circumstances; for if the officer in the heat of pursuit, and merely in order to overtake the defendant, should strike him with a stick, or other weapon not likely to kill, and death should thence result, this will, at most, be manslaughter, and may amount only to accidental homicide; whereas, if a deadly weapon had been used, it would have been murder (*v*). The remark just made seems, indeed, to hold equally true whether the flight took place through fear of arrest in a purely civil proceeding, or on a warrant for a breach of the peace, or any other misdemeanor. Where, however, a felony having been committed, the felon flies from justice, it is the duty of every individual present to use his best endeavour to prevent his escape; and if in the pursuit the party flying is killed, when he cannot be otherwise overtaken, this will be deemed justifiable homicide; for the pursuit was not

(*t*) See Cr. L. Com., 4th Rep., p. 21.

(*u*) Fost. Disc. Hom., p. 270.

(*v*) Id., p. 271.

barely warrantable but required by the law; it being, moreover, the duty of an offender quietly to yield himself up to public justice (*x*).

It may readily be inferred, from what has been above said, that, on a charge of homicide in resisting a lawful arrest, the guilt of the offender may depend entirely upon nice and difficult questions belonging to the civil branch of the law, such as the technical regularity of civil process, or the precise duty of a minister of justice in its execution. In any case of the kind alluded to, three points will be found to deserve especial notice, viz. the legality of the deceased's authority (*y*), the legality of the manner in which he executed it (*z*), and the defendant's knowledge of that authority. If an officer of justice be killed in attempting to execute a writ or warrant invalid on the face of it (*a*), or against a wrong person, or out of the district in which alone it could legally be executed, or if a private person interfere and act in a case where he has no authority by law to do so (*b*), or if the defendant had no knowledge of the officer's character or business (*c*), or of the intention with which a private person interferes, and the officer or private person be resisted and killed, the killing will be manslaughter only (*d*).

(*x*) Id., ibid.; 1 Hale P. C., p. 481. See *Reg.* v. *Dadson*, 2 Den. C. C. 35.

(*y*) *R.* v. *Thompson*, 1 Mood. C. C. 80; *R.* v. *Ford* Russ. & Ry. 329; *R.* v. *Curran*, 3 Car. & P. 397.

(*z*) *R.* v. *Cook*, Cro. Car. 537.

(*a*) See *R.* v. *Hood*, 1 Mood. C. C. 281.

(*b*) *Reg.* v. *Phelps*, Car. & M. 180; *R.* v. *Curran*, 1 Mood. C. C. 132; *R.* v. *Curran*, 3 Car. & P. 397. See *Reg.* v. *Price*, 8 Car. & P. 282; *Derecourt* v. *Corbishley*, (Q. B.), 19 Jur. 870; ante, pp. 724 et seq.

(*c*) See *R.* v. *Woolmer*, 1 Mood. C. C. 334; *R.* v. *Howarth*, Id. 207; Fost. Disc. Hom., p 298.

(*d*) Arch. Cr. Pl., 12th edit., p. 510; in the ensuing pages (pp. 511

Reg v *Serva.*

In *Reg.* v. *Serva* (*e*), a question somewhat analogous to the above was learnedly discussed, viz. as to the legality of the capture by a British man-of-war of a vessel alleged to be a slaver, and the lawfulness or otherwise of homicide committed by her crew in attempting to regain possession of her after capture from the officer and men placed in charge of her by the Queen's ship. The accused, however, in this case were eventually acquitted, on the ground of a want of jurisdiction in our Courts to try the offence charged.

Homicide—where justifiable.

Homicide, then, may be of various kinds and degrees; it may be *justifiable*, as where a sheriff executes a criminal in strict conformity with his sentence; or where, as above mentioned, an inferior officer of justice kills a person who forcibly and illegally resists capture, or who attempts the rescue of a prisoner (*f*); or where the death of an individual attempting to commit some atrocious crime is caused by the individual whose person or property is threatened by his violence; where, indeed, a felony is attempted on the person, as robbery or murder, the party assaulted may repel force by force (*g*). A woman, in defence of her chastity, may lawfully kill an assailant; and if an attempt be made to commit arson, or burglary, the owner of the dwelling-house, or any member of his family, or even a lodger, may, in preventing the mischief contemplated, lawfully kill the assailant (*h*). A mere trespasser, however, on the land of

—516) of which standard Treatise, that particular branch of the Law of Homicide above adverted to is fully considered.

(*e*) 1 Den. C. C. 104.

(*f*) Ante, pp. 929, 930.

(*g*) See *Reg.* v. *Huntley*, 3 Car. & K. 142.

(*h*) Fost. Disc. Hom., p. 274; *R.* v. *Hunt*, 1 Mood. C. C. 93; *R.* v *Levett*, cited Cro. Car. 538.

another, although actuated by a felonious intention, could not legally be shot at (*i*). And if A., finding a trespasser upon his land, beats and thus chances to kill him, he is guilty of manslaughter; or, if there be added to the above state of facts circumstances evidencing malice, of murder (*j*)

The authorities below cited will suffice to shew, that, in some special cases involving circumstances of peculiar aggravation, homicide may, in the absence of malice, be reduced in degree from murder to manslaughter (*k*).

Homicide—where excusable.

Homicide may, also, be *excusable;* as where it occurs by misadventure, i. e. where "a man doing a lawful act without any intention of hurt, unfortunately kills another" (*l*); as if he were shooting at a mark in a place adapted for that pastime, and under circumstances which rendered it permissible.

So, homicide may by *ignorantia facti* be rendered excusable; as where a man, intending to kill a thief or housebreaker being in his house, by mistake kills one of his own family (*m*). And if a man receiving a drug from an apothecary or chemist, without any reason to suppose it to be other than a salutary medicine, were to administer it, being in truth deadly poison, his utter ignorance of the fact would excuse him (*n*).

Again: there are cases, also, in which a man may be excused, who, to protect himself, in the course of a sudden

(*i*) *R.* v. *Scully*, 1 Car. & P. 319; *Reg.* v. *Dadson*, 2 Den. C. C. 35. See *R.* v. *Meade*, 1 Law C. C. 185.

(*j*) Fost. Disc. Hom., p. 291.

(*k*) Fost. Disc. Hom., p. 296; *R.* v. *Manning*, T. Raym. 212; *Reg.* v. *Fisher*, 8 Car. & P. 182; *Reg.* v. *Kelly*, 2 Car. & K. 814.

(*l*) 4 Bla. Com., p. 182.

(*m*) 4 Bla. Com., p. 27.

(*n*) Cr. L. Com., 7th Rep., p. 26.

broil or quarrel, kills his assailant; homicide when excusable under such circumstances being, however, with difficulty distinguishable from manslaughter. He who in the case of a homicide by his hand, happening in the course of a mutual conflict wherein he was engaged, would excuse himself upon the ground of self-defence, "must shew, that, before a mortal stroke given, he had declined any further combat, and retreated as far as he could with safety, and also that he killed his adversary through mere necessity, and to avoid immediate death." Should the accused party fail in these particulars, he will incur the penalties of felonious homicide (*o*). A., of malice prepense, discharges a pistol at B., and then runs away. B. pursues him; whereupon A. turns back, and in his own defence kills B. This is murder (*p*). C. being assaulted by D. returns the blow, and a fight ensues; C., before a mortal wound given, declines any further conflict, and retreats as far as he can with safety, and then in his own defence kills D. This homicide is excusable, as being done in self-defence (*q*).

The stat. 9 Geo. 4, c. 31, s. 10, provides that "no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune, or in his own defence, or in any other manner without felony."

Lastly; in connection with the offence of felonious homicide, and more particularly in regard to the jurisdiction of the Court and to the functions of the jury on a trial for homicide, the following observations suggest themselves:—

Jurisdiction where homi-

1. With respect to the jurisdiction of the Court, it is, by

(*o*) Fost. Disc. Hom., p. 277.
(*p*) Keel. 129.
(*q*) Fost. Disc. Hom., p. 277; *Reg.* v. *Nailor*, cited Id., p. 278.

the 9 Geo. 4, c. 31, s. 8, enacted, that where any person being feloniously struck, poisoned, or otherwise hurt upon the sea, or at any place out of England, shall die of such stroke, poisoning, or hurt in England, or being feloniously struck, poisoned, or otherwise hurt at any place in England, shall die, in consequence thereof, upon the sea or abroad, the offence thus committed, whether amounting to murder or manslaughter, shall be triable in England.

cide occurs abroad.

2. It is a precautionary rule, recognised on trials for felonious homicide, that proof be required of the finding of the body of deceased; for *tutius semper est errare in acquietando quàm in puniendo—ex parte misericordiæ quàm ex parte justitiæ* (*r*). This rule, however, is not altogether inflexible, as where the direct evidence brought before the jury is sufficiently strong to satisfy them that murder has really been committed (*s*).

Proof of the corpus delicti.

3. It is also a rule that no person shall be adjudged by any act whatever to have killed another, if that other does not die within a year and a day after the stroke received or cause of death administered (*t*), i. e. within a year exclusive of the day on which the mortal blow was given, or the cause of death, if poison were used, was administered (*u*).

Death must have occurred within a year and day.

4. Upon an indictment for murder, the accused party may be acquitted of the murder and yet found guilty of manslaughter, the homicide being the main fact in issue, and the existence of malice prepense in the mind of the

On indictment for murder, jury may convict of manslaughter.

(*r*) 2 Hale P. C., p. 290.

(*s*) *R.* v. *Hindmarsh*, 2 Leach C. C. 569. See *Reg.* v. *Hopkins*, 8 Car. & P. 591.

The above-mentioned rule is fully stated and considered in Best on Pres., pp. 269 et seq.

(*t*) 1 Russ. Cr., 3rd edit., p. 505; 1 Hawk. P. C., Bk. 1, chap. 31, s. 9.

(*u*) Cr. L. Com., 7th Rep., p. 27; Hawk. P. C., ubi sup.

accused being a circumstance in aggravation only (*v*). On such an indictment the jury cannot, however, convict of an assault (*x*).

Accessory before the fact—how punishable.

5. Further: It is a principle in law, that "he who procureth a felony to be done is a felon. If present, he is a principal; if absent, an *accessory before the fact*" (*y*). And by a recent statute (11 & 12 Vict. c. 46, s. 1), it is enacted, that, if any person shall become an accessory before the fact to any felony, such person may be indicted, tried, convicted, and punished, in all respects as if he were a principal felon (*z*).

Assault.

Aggravated assault.

Next in order to the offence of homicide, felonious or otherwise, may properly be noticed assaults against the person, which are usually classified under two heads, aggravated and common assaults. Belonging to the former class of assaults are some—ex. gr. an assault with intent to rob—which will come under observation in the ensuing section; but in this place I may remind the reader that amongst aggravated assaults which are by express enactment constituted felonies, are included the stabbing, cutting, or wounding any person, or the causing to any person, by any means whatsoever, any bodily injury dangerous to life, *with intent to commit murder* (*a*); the attempting to

(*v*) Co. Litt. 282, a.; 1 Hale P. C., p. 449; 2 Id., p. 302. See per *V. Williams*, J., *Reg.* v. *Bird*, 2 Den. C. C. 116; and per *Jervis*, C. J., *Reg.* v. *Reid*, Id. 92, cited post.

(*x*) 14 & 15 Vict. c. 100, s. 10.

(*y*) Foster, p. 125. Such an accessory was the Earl of Somerset to the murder of Sir Thomas Overbury: 2 How. St. Tr. 965.

(*z*) As to the trial and conviction of accessories after the fact, see 11 & 12 Vict. c. 46, s. 2.

To a misdemeanor there are no accessories: see *Reg.* v. *Clayton*, 1 Car. & K. 128; *Reg.* v. *Greenwood*, 2 Den. C. C. 453.

(*a*) 7 Will. 4 & 1 Vict. c. 85, s. 2. See *Reg.* v. *Cruse*, 8 Car. & P. 541; *Reg.* v. *Jones*, 9 Id. 258, which illustrates the rule stated ante, p 874, that 'every one must be taken

administer poison to any person, or to shoot at any person &c., *with a like intent* (*b*); the unlawfully and maliciously shooting at any person, or the stabbing, cutting, or wounding any person, *with intent to maim, disfigure, or disable* such person, *or to do some other grievous bodily harm* to him, *or* with intent *to resist or prevent the lawful apprehension or detainer of any person* (*c*). And if upon the trial of an indictment for any felony, except murder or manslaughter, which alleges that the defendant did cut, stab, or wound any person, the jury shall be satisfied that the defendant is guilty of the cutting, stabbing, or wounding, but are not satisfied that the defendant is guilty of the felony charged in such indictment, the jury may acquit of the felony, and convict of the unlawfully cutting, stabbing, or wounding (*d*), which, under the 14 & 15 Vict. c. 19, s. 4, is a misdemeanor.

Again—any assault *with intent to commit a felony;* any assault upon a peace officer, or revenue officer, in the due execution of his duty, or upon any person acting in aid of such officer; any assault upon any person with intent to resist or prevent the lawful apprehension or detainer of the party so assaulting (*e*), or of any other person for any offence for which he or they may be liable by law to be apprehended or detained; any assault committed in pursuance of a conspiracy to raise the rate of wages—is indictable as a misdemeanor (*f*). And if the accused be charged with an assault with intent to commit felony, and the evidence

to intend the necessary consequences of his own act.'

(*b*) Id., s. 3. See *Reg.* v. *Williams*, 1 Den. C. C. 39.

(*c*) 7 Will. 4 & 1 Vict. c. 85, s. 4. See *Reg.* v. *Calvert*, 3 Car. & K. 201; *Reg.* v. *Griffiths*, 8 Car. & P. 248.

(*d*) 14 & 15 Vict. c. 19, s. 5.

(*e*) See *Reg.* v. *Walker*, 1 Dearsl 358.

(*f*) 9 Geo. 4, c. 31, s. 25

offered establish the assault, but fail in shewing the intent, the defendant may, nevertheless, be convicted of a common assault (*g*).

With a view also to the better protection of persons under the care and control of others, as apprentices or servants, the stat. 14 & 15 Vict. c. 11, s. 1, provides a special punishment "where the master or mistress of any such person shall unlawfully and maliciously assault such person, whereby the life of such person shall be endangered, or the health of such person shall have been or shall be likely to be permanently injured."

Assault and battery.

Thus much for aggravated assaults. Let us then, in the next place, consider the liability attaching to one who makes an *assault* or *battery* on another, unattended by any of the aggravating circumstances above specified. At a former page (*h*) has been stated the signification of either of the words just used in connection with purely civil proceedings; and referring the reader to what has been there said upon the matter in question, it will here suffice merely to add, that, according to our writers upon criminal law, an 'assault' is an attempt or offer, with force and violence, to do a corporal hurt to another,—as by striking at him either with or without a weapon, or presenting a gun at him if within range, or by pointing any other dangerous weapon at him whilst standing within reach of it, or by holding up one's fist at a man, or by any such like act done in an angry threatening manner, under circumstances denoting an in-

(*g*) Arch. Cr. Pl., 12th edit., p. 541.

It is material to observe, that the 7 Will. 4 & 1 Vict. c. 85, s. 11, which, on the trial of any person for *felony, where the crime charged includes an assault*, empowered the jury to acquit of the felony and find a verdict of guilty of an assault only, was repealed by the 14 & 15 Vict. c. 100, s. 10.

(*h*) Ante, p. 691.

tention, coupled with a present ability, of carrying the threat into execution (*i*); or by encouraging a dog to bite a man (*j*), or by unlawful imprisonment (*k*); though words only cannot constitute an assault (*l*). A 'battery' includes any injury, however slight, actually done to the person of another in an angry, revengeful, rude or insolent manner—even touching the person of another against his consent might constitute a battery (*m*).

In what an assault may consist will sufficiently appear from the above general remarks, coupled with what was said upon this subject at a former page (*o*). It may be well, however, further to observe, that although an assault cannot in law be committed on one who actually consents thereto (*p*), yet where non-resistance to an act is obtained by fraud, such act *may* constitute an assault (*q*). There is, moreover, an appreciable difference between consent and submission; for although every consent involves a submission, it by no means follows that a mere submission involves consent (*r*). It seems

(*i*) Hawk. P. C., Bk. 1, chap. 62, s. 1; 1 East P. C., p. 406.

(*j*) Russ. Cr., 3rd edit., vol. 1, p. 751.

(*k*) Id., p. 753.

(*l*) Hawk. P. C., Bk. 1, chap. 62, s. 1.

(*m*) Id., s. 2.

The indictment for an assault and battery charges that the defendant "in and upon one A. B. unlawfully did make an assault, and him, the said A. B., did then beat, wound, and ill-treat, &c."

Inasmuch as every battery includes an assault, if, on an indictment for an assault and battery, the assault is ill laid, the defendant may be convicted of the battery: Hawk. P. C., Bk. 1, chap. 62, s. 1.

(*o*) Ante, p. 691, where the cases are collected.

See also *R.* v. *Nichol*, Russ. & Ry. 130; *R.* v. *Rosinski*, 1 Moo. C. C. 19.

(*p*) *Reg.* v. *Read*, 1 Den. C. C. 377; *Reg.* v. *Martin*, 2 Moo. C. C. 123.

(*q*) *Reg.* v. *Case*, 1 Den. C. C. 580; *Reg.* v. *Saunders*, 8 Car. & P. 265; *Reg.* v. *Williams*, Id. 286. See *Reg.* v. *Clarke*, 1 Dearsl. 397 (following *R.* v. *Jackson*, Russ. & Ry. 487); *Reg.* v. *Hanson*, 2 Car. & K. 912; *Reg.* v. *Stanton*, 1 Car. & K. 415.

(*r*) Per *Coleridge*, J., *Reg.* v. *Day*, 9 Car. & P. 724. See *Reg.* v. *Camplin*, 1 Den. C. C. 89.

clear, too, that the fact of consent will in general be immaterial where an actual battery, and *breach of the peace*, has been committed (*s*).

Without attempting to specify the various matters available by way of defence to an indictment for an assault, of which indeed the more important have been already sufficiently indicated (*t*), I would add, that an actionable injury amounting to an assault, or even to a battery, is not necessarily indictable, ex. gr., if it be purely accidental (*u*); and it is laid down as a general rule, that the same facts which would make a killing homicide by misadventure will afford a good defence upon an indictment for a battery (*x*). Although, moreover, a conviction on a criminal charge does not per se constitute any defence to a civil action founded on the transaction out of which such charge originated, yet the Court of Queen's Bench has declined to pass sentence for an assault, whilst an action was pending for the same trespass (*y*). And it should be borne in mind,

(*s*) In 1 Den. C. C. 380, n., occur the following remarks, apposite to the above point, by the learned Reporter:—"An assault seems to be any sort of personal ill-usage, short of a battery, done to another against his consent. Therefore such act done with consent is no breach of the peace or crime. A battery is simply a beating, or some act which the law deems equivalent. It is not only a trespass, but a breach of the peace, and though done with consent, is primâ facie illegal. Therefore, the consent of each party in a prize fight does not legalise the battery, though it negatives the mere assault." In such a case the rule would seem to apply, that 'license to beat me is void, because it is against the peace.' See *Matthew* v. *Ollerton*. Comb. 218.

(*t*) Ante, p. 692. And see per Lord *Abinger*, C. B., *Reg.* v. *Meredith*, 8 Car. & P. 590, who says, that, "to support a charge of assault, you must shew an assault which could not be justified if an action were brought for it, and leave and license pleaded."

(*u*) *R.* v. *Gill*, Str. 190. See *Underwood* v. *Hewson*, Str. 596; *Dickenson* v. *Watson*, T. Jones, 205.

(*x*) Arch. Cr. Pl., 12th edit., p. 525.

(*y*) *R.* v. *Mahon*, 4 Ad. & E. 575. See *Ex parte Anon.*, Id. 576 (*a*).

that, by the stat. 9 Geo. 4, c. 31, ss. 27 and 28, justices of the peace are invested with a summary jurisdiction to hear and determine any charge of common assault and battery, and on conviction to punish the offender by fine, and, in default of payment thereof, by imprisonment. If, however, the justices, upon the *hearing* (*z*) of any such charge, shall deem the offence not to be proved, or shall find the assault and battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they are required to deliver to the accused party a certificate of the fact of such dismissal, and such certificate, or payment of the fine or endurance of the imprisonment awarded, will operate as a bar to any subsequent proceeding, civil or criminal, in respect of the same cause. But justices of the peace have no summary jurisdiction in the case of an assault or battery accompanied by an attempt to commit felony, or where from any other circumstance the assault in question appears to be a fit subject for prosecution by indictment, or where the title to land is brought in question, or in some other cases.

Libel.

The offence of libel against an individual (*a*), observes a learned writer upon that department of our criminal law (*b*), consists in the act of publishing the defamatory matter set forth on the record in the sense attributed to it by the innuendos, with the intention alleged in the indictment—viz. to injure, vilify, and prejudice the prosecutor, and to deprive him of his good name, &c., and to bring him into

(*z*) See *Tunnicliffe* v. *Tedd*, 5 C. B. 553.

(*a*) To which species of libel are the remarks in the text restricted.

(*b*) Starkie on Slander and Libel, 2nd edit., vol. 2, p. 327.

The definition of a libel is given ante, p. 747.

public contempt (*c*)—maliciously, without any legal justification or excuse.

Now, on examining the constituent ingredients in this offence as above set forth, we shall observe that the fact of publishing the illegal matter, and of its being published in the particular sense assigned to it (*d*), the existence or non-existence of the circumstances relied upon as affording a legal justification or excuse for the alleged libel, and, generally, the question whether the act of publication charged was done maliciously or wrongfully (*e*), are properly for the decision of the jury. Whereas, it will be for the Court to determine whether the facts proposed to be proved would, when proved, suffice in law to constitute a publication (*f*) and to support the innuendos; it will be for the Court to say whether the matter charged as libellous is so in law—and whether the facts accompanying the publication amount to a legal justification or excuse for it (*g*).

(*c*) See the form of an indictment for libel, Arch. Cr. Pl., 12th ed., p. 694.

(*d*) The jury should "read the paper stated to be a libel as men of common understanding, and say whether, in their minds, it conveys the idea imputed:" per *Buller*, J., *R.* v. *Watson*, 2 T. R. 206.

(*e*) In *R.* v. *Shipley*, 4 Dougl. 177, *Ashhurst*, J., observes, that "every man (who is of sufficient understanding to be responsible for his actions) is supposed to be cognisant of the law, as it is the rule by which every subject of the kingdom is to be governed; and, therefore, it is his business to know it (ante, p. 864). If, therefore, a man publishes that which the law says is treasonable, seditious, or rebellious, the alleging in the indictment or information that the party did it with a libellous or seditious intent, is a mere matter of legal inference from the fact of publication, and not the object of proof either on the one side or the other." "But, where the fact of publication is ambiguous (as where it may be a doubt whether the party pulled the paper out of his pocket by accident or on purpose, or whether he gave one paper instead of another, or any such supposable case), there the maxim holds, that *actus non facit reum nisi mens sit rea*." See *R.* v. *Watson*, 2 B. & C. 257.

(*f*) Ante, p. 758.

(*g*) Stark. Slander and Libel, 2nd edit., vol. 2, pp. 327—331. See *Gregory* v. *Reg*, 12 Q. B. 957.

Before the passing of Mr. Fox's celebrated Libel Act in the year 1792, it was judicially laid down, that, although it was the province of the jury thus to determine the fact of publication, and whether or not the libel meant that which it was alleged in the indictment to mean, it was exclusively the province of the Court to say whether such meaning were criminal or not; and that, if the jury should disregard the opinion of the Judge in regard to this point, they would violate their oaths and duty (*h*); the practice, accordingly, on a criminal trial for libel, at the time alluded to, was this:—where no facts or circumstances appeared raising any justification or excuse for the alleged libel in point of law, and where consequently there was no real question of intention to be left to the jury, the Court directed them to find a verdict of guilty if they were satisfied as to the fact of publication, and the truth of the innuendos set forth in the indictment; although, if the alleged libel were in point of law no libel, the defendant might have arrested the judgment by reason of the defect, which would in that case be apparent on the record (*i*). Strong opinions being entertained, however, adverse to this mode of procedure by many, apprehensive that the liberties of the subject might be thus threatened, the statute above referred to (32 Geo. 3, c. 60) was passed, enacting by its 1st section,—which was declaratory of the law and designed to put prosecutions for libel on the same footing as other criminal cases (*j*)—that on every trial of an indictment (*k*) for a libel, the defendant having pleaded not guilty,

(*h*) See Hall. Const. Hist. Eng., 8th edit., vol. 3, p. 169.

(*i*) Stark. on Slander and Libel, 2nd edit., vol. 2, p. 334. See per Lord *Mansfield*, C. J., *R.* v. *Woodfall*, 5 Burr. 2666; *R.* v. *Withers*, 3 T. R. 428; *R.* v. *Dean of St. Asaph*, Id., n. (*a*); *R.* v. *Shipley*, 4 Dougl. 73.

(*j*) Per *Parke*, B., *Parmiter* v. *Coupland*, 6 M & W. 108.

(*k*) The statute applies also to the trial of an information for libel.

the jury sworn to try the issue thus raised may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment, and shall not be required or directed by the presiding Judge to find the defendant guilty merely on proof of the publication by him of the paper charged to be a libel, and of the sense ascribed to the same in such indictment. The 2nd section of the Act, however, provides that on every such trial the Judge shall, according to his discretion, give his opinion and directions to the jury on the matter in issue between the Crown and the defendant, in like manner as in other criminal cases, the jury (under sect. 3) being also entitled in their discretion to return a special verdict, and the defendant, after an adverse verdict, being entitled (sect. 4) to move in arrest of judgment as he might have done before the Act.

The effect of the statute above abstracted seems to have been simply to restore in criminal trials for libel the ordinary course and practice of the common law (*l*). Long, indeed, before Mr. Fox's Libel Act, and from its date down to the passing of the recent very salutary enactment, 6 & 7 Vict. c. 96, the truth of the charges contained in a libel afforded no ground of defence to an indictment or criminal information for publishing it (*m*). "The truth of such charges could not" then "be given in evidence under a plea of not guilty, and no special justification on the ground of truth could be pleaded. It was even said, that 'the greater the truth the greater the libel.' The legislature," however, "thinking that such a maxim misapplied brought discredit on the administration of justice, and that under certain

(*l*) Stark. on Slander and Libel, 2nd edit., vol. 2, p 332.

(*m*) See Hall. Const. Hist. Eng., 8th edit., vol 3, p 169, n.

guards and modifications the truth of the charges might advantageously be inquired into, and might be permitted to constitute a complete defence," passed the statute last referred to (*n*); by the 6th section whereof the defendant may now, in answer to an indictment for libel, allege the truth of the matters charged therein in the manner required in pleading a justification to an action for defamation, and may further allege that it was for the public benefit that the said matters charged should be published, and the particular fact or facts by reason whereof it was so. If a plea of the kind just specified be pleaded, the defendant will be entitled to give evidence of the truth of the matters charged as libellous, by way of defence to the indictment; and "the truth of the matters charged may" then "be inquired into but shall not amount to a defence, unless it was for the public benefit that the said matters charged should be published." Issue being taken on this plea, and the defendant being convicted, it is competent to the Court in pronouncing sentence to consider whether the guilt of the defendant is aggravated or mitigated by the plea pleaded, and by the evidence given to prove or disprove the same.

It is clear, that, if to a plea of justification the prosecutor replies that the defendant wrongfully published the libel charged in the indictment without the cause alleged, and issue is joined upon this replication, the prosecutor will be entitled to a verdict, unless the defendant establishes the truth of *all* the material allegations in the plea, the only function allotted to the jury in the case supposed being to say whether the whole plea is proved or not. If they find that it is proved, the defendant is acquitted. If they

(*n*) Judgm. *Reg.* v. *Newman*, 1 E. & B. 573; *S. C.* 1 Dearsl. 85.

think that it is not, they are to declare that the defendant wrongfully published the libel without the cause alleged, and he is convicted. The jury are then functi officio (*o*), and nothing will remain save for the Court to pass sentence on the defendant. In doing so, however, the just measure of punishment to be awarded may materially depend upon the bona fides or otherwise of the unsuccessful plea of justification, and on the nature and weight of the evidence given under it (*o*).

A comparison of the 4th and 5th sections of Lord Campbell's Libel Act will further shew that the punishment assigned by the legislature to the publisher of a defamatory libel varies according as he did or did not know it to be false. And under sect. 7 of the same statute, when evidence has been given establishing a presumptive case of publication against the defendant by the act of any other person by his authority, it is competent to him to prove that the publication in question was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part. Also, by sect. 8, the defendant, if acquitted on a prosecution, at suit of a private prosecutor, for a defamatory libel, will be entitled to recover from him his costs, whereas if the defendant fails upon a special plea of justification, he will have to pay the costs sustained by the prosecutor by reason of such plea.

Besides the procedure by indictment for a libel on an individual, a criminal information (*p*) will in some cases be granted by the Court of Queen's Bench, ex. gr., where the libel conveys imputations of a serious nature, and is declared

(*o*) Judgm. *Reg.* v. *Newman*, 1 E. & B. 573-4; *S. C.*, 1 Dearsl. 85.

(*p*) As to which, see ante, Bk I Chap. 5

by affidavit to be false (*q*). The applicant for such criminal information however, whether it be granted or refused, is understood to waive his right of afterwards bringing an action for the libel in question, unless the Court, on hearing the whole matter, shall otherwise direct (*r*).

Further, it remains but to add that not merely will the actual publisher of a libel be amenable to our criminal law; so will he be who shall threaten to publish any libel upon any other person, or shall directly or indirectly threaten to print or publish, or propose to abstain from printing or publishing, or offer to prevent the printing or publishing of any matter or thing touching any other person "with intent to extort any money, or security for money, or any valuable thing from such or any other person, or with intent to induce any person to confer or procure for any person any appointment or office of profit or trust" (*s*).

Such is the state of our criminal law at the present day in regard to offences against the reputation of individuals, amended as it has been with a threefold view—for the better protection of private character—for more effectually securing the liberty of the press—and for the prevention of abuses in exercising such liberty (*t*).

(*q*) See *Reg.* v. *Newman*, 1 E. & B. 268; *S. C.* 1 Dearsl. 85; *Ex parte Duke of Marlborough*, 5 Q. B. 955; *Reg.* v. *Gregory*, 8 Ad. & E. 907; *Ex parte Chapman*, 4 Ad. & E. 773. As shewing under what circumstances words spoken are indictable, see per *Holt*, C. J, *Reg.* v. *Langley*, 6 Mod. 124, and in *R.* v. *Bear*, 2 Salk. 417.

(*r*) Cole on Crim. Inform., p. 19.

(*s*) 6 & 7 Vict. c. 96, s. 3.

(*t*) See the preamble to 6 & 7 Vict. c. 96.

SECT.—II. *Of Offences against Property.*

The brief inquiry respecting some of the ordinary Offences against Property, and the attempt to distinguish between them, which will here be made, may conveniently commence with an analysis of the crime of *Simple Larceny*—i. e. larceny at common law, or, as Blackstone (*u*) describes it, "plain theft, unaccompanied with any other atrocious circumstance."

Simple larceny.

Simple larceny may be defined to be 'the wrongful taking and carrying away of the personal property of another, with a felonious intent to convert it to the taker's own use, without the consent of the owner' (*x*). This offence is specially characterised by one ingredient, viz. "a wrongful removal (taking and carrying away) of the property of another, whether it be effected without consent or by consent obtained by intimidation or fraud, so as the owner consent not in the latter case to part with his entire right of property, but with the temporary possession only" (*y*). And, accordingly, the indictment for larceny charges that the accused did "feloniously steal, take, and carry away" goods and chattels, therein specified, of C. D.

Of what things larceny cannot be committed at common law.

Things attached to or savouring of the realty.

Now it may be advisable at once to notice that of certain things larceny cannot by our common law be committed. For,—1. Our common law holds exempt from being the subject of larceny whatever is attached to or savours of the realty. For this rule various subtle reasons have been

(*u*) 4 Com. p. 229.

(*x*) See the opinion of the judges in *Hammon's case*, 2 Leach, C. C. 1089; Arch. Cr. Pl, 12th edit., p 264; Judgm. *Reg.* v. *Thurborn*, 1 Den. C. C. 388. As to the correctness of adding to the above definition, that the taking was *lucri causâ*, see *Reg.* v. *Jones*, 2 Car. & K. 236, and cases cited, post, p. 957, n. (*p*).

(*y*) Cr. L. Com., 4th Rep, p. 50.

assigned; but whether it originated in the notion that the severed portion of the realty, though removable and actually removed, was, in legal construction, still adhering to the freehold, and therefore incapable of removal; or that the wrong-doer acquired some sort of property in the severed chattel; or that it never was a chattel in the possession of the owner of the realty (*z*); the reason is alike unsatisfactory to modern intelligence. However, the taking of chattels real, or anything savouring of the land, as a box of title-deeds, or charters that concern it, is at common law no larceny (*a*). Nor can larceny be committed at common law of standing corn (*b*), nor of fruit from a tree which is growing, "because, from its adherence to the freehold, it is not larceny to steal the tree itself" (*c*).

Choses in action.

2. It is a rule of our common law, frequently recognised by the legislature (*d*), that larceny cannot be committed of a chose in action, as a bond, bill of exchange, &c. (*e*); the reason of which rule seems to be, that stealing the evidence of a man's right does not interfere with the right itself (*f*).

An indictment, therefore, would not lie for stealing a stamped agreement, though, if unstamped, a distinction must be noticed between an instrument which without a stamp is wholly void, and one which may at any moment

(*z*) Cr. L. Com., 1st Rep., p. 15.

(*a*) 1 Hale P. C., pp. 509, 510. See the 7 & 8 Geo. 4, c. 29, s. 23.

(*b*) 1 Hale P. C., p. 510.

(*c*) *R.* v. *Martin*, 1 Leach C. C. 171. See the 7 & 8 Geo. 4, c. 29, ss. 38, 39, 42.

(*d*) See, for instance, the 7 & 8 Geo. 4, c. 29, s. 5.

(*e*) 8 Rep. 33 b; Byles on Bills, 6th edit., p. 137; *R.* v. *Mead*, 4 Car. & P. 535; *Reg.* v. *Powell*, 2 Den. C. C. 403.

(*f*) Per Lord *Campbell*, C. J., *Reg.* v. *Watts*, 1 Dearsl. 332.

be rendered available by having a stamp impressed upon it. In the former case, the paper upon which the agreement was written might be the subject of larceny (*g*); in the latter case it could not be so, for it would be evidence of a chose in action (*h*), and a higher character having been given to it, its character as a piece of paper would be thereby absorbed (*i*).

Animals feræ naturæ.

3. A corpse is not the subject of property (*k*). And of animals feræ naturæ, unreclaimed and unconfined, nay even of some domesticated animals, which are in their nature unfit for human food (*l*), larceny cannot, unless by virtue of some express provision of the statute law (*m*), be committed.

In modification of the above-mentioned peculiar doctrines of our common law, various enactments, some only of which have been above specified (*n*), have from time to time been passed, containing important provisions with regard to the felonious removal of various things annexed to the freehold; with regard to instruments coming within the class of choses in action; with regard also to various animals, of which larceny could not, without the interposition of the legislature, have been committed (*o*).

(*g*) See per *Beardsley*, J., *The People* v. *Loomis*, 4 Denio (U. S.) R. 381; *Reg.* v. *Morris*, 9 Car. & P. 349; *Reg.* v. *Perry*, 1 Den. C. C. 69; *R.* v. *Mead*, 4 Car. & P. 535; *R.* v. *Walker*, 1 Mood. C. C. 155.

(*h*) *Reg.* v *Watts*, 1 Dearsl. 326, 332.

(*i*) Per *Coleridge*, J., 1 Dearsl. 334.

(*k*) 4 Bla. Com. p. 236.

(*l*) *R.* v. *Spearing*, Russ. & Ry. 250; *R* v. *Brooks*, 4 Car. & P. 131; *Reg.* v. *Cheafor*, 2 Den. C. C. 361; *Reg.* v. *Howell*, Id. 363 n.; *Hannam* v. *Mockett*, 2 B. & C. 934, 944.

(*m*) See, for instance, in the case of dog-stealing, the 8 & 9 Vict. c. 47.

(*n*) Supra, in notis.

(*o*) The statutes here alluded to are collected in Arch. Cr. Pl., 12th edit., pp. 256—260.

Let us now consider seriatim the various ingredients in, and points of practical importance connected with, the crime of larceny.

Property in things stolen —how laid

To constitute this offence, the chattel feloniously taken must have been the property, absolute or special (*p*), of its alleged owner. And cases do sometimes occur in which a doubt may exist as to the party in whom the ownership of or property in a chattel was, at the time of its assumed wrongful conversion, really vested. In *Reg.* v. *Smith* (*q*), the following facts appeared in evidence: the prisoner, professing to be about to pay the prosecutor some money due to him, produced a receipt stamp, which the latter filled up for the amount mentioned by the prisoner, who then, without paying the money due, went away with the receipt, intending to defraud the prosecutor; upon these facts it was held, that the prisoner could not be found guilty of stealing the receipt stamp from the prosecutor, because it had never been in his possession independently of the prisoner, nor was it ever intended that the receipt should be the property of the prosecutor.

Possession actual or constructive.

In the next place, it is observable that, in order to constitute a 'taking' within the meaning assignable to that word in the definition of simple larceny, the chattel alleged to have been taken must have been in the possession, actual or constructive, of him in whom the property is laid.

(*p*) If property be stolen out of the possession of a bailee, it may be described in the indictment as the property either of the bailor or of the bailee: 2 Hale P. C. p. 181. See the cases in support of this proposition collected, Arch. Cr. Pl., 12th edit., pp. 33, 261: *Reg.* v. *Vincent*, 2 Den. C. C. 464.

(*q*) 2 Den. C. C. 449 (with which compare *Reg.* v. *Rodway*, 9 Car. & P. 784). See also *Reg.* v. *Johnson*, 2 Den. C. C. 310; *Reg.* v. *Frampton*, 2 Car. & K. 47.

Reed's case (*r*) shews very clearly what is meant by a 'constructive' possession sufficient to support an indictment for larceny. There, the prisoner (Reed) had been sent by his master, with a cart belonging to the latter, to fetch coals from the wharf of a company with whom he dealt for that article. On his way home with the coals the prisoner, without authority for so doing, disposed of a quantity of them to a third person, and the question was whether he could be convicted of larceny for so doing. It was held that he might be thus convicted. There can be no doubt, remarked Lord *Campbell*, C. J., that, to support an indictment for larceny in such a case, the goods alleged to have been stolen must have been in the actual or constructive possession of the master; and "if the master had not otherwise the possession of them than by the bare receipt of his servants upon the delivery of another for the master's use, although as against third persons this is in law a receipt of the goods by the master, yet in respect of the servant himself this will not support a charge of larceny, because, as to him, there was no tortious taking in the first instance, and consequently no trespass (*s*). Therefore, if there had been here a quantity of coals delivered to the prisoner for the prosecutor, and the prisoner, having remained in the personal possession of them . . . without anything having been done to determine his original exclusive possession, had converted them animo furandi (*t*), he would have been guilty of embezzlement (*u*), and not of larceny. But if the servant has done anything which de-

(*r*) 1 Dearsl. 168, 257.

(*s*) As to applying the test here adverted to, see post, p. 956.

(*t*) As to which, see post, p. 957.

(*u*) Post, p. 972.

termines his original exclusive possession of the goods, so that the master thereby comes constructively into possession, and the servant afterwards converts them animo furandi, he is guilty of larceny, and not merely of a breach of trust at common law or of embezzlement under the statute" (*v*). The reason being that in this latter case there is a tortious and felonious 'taking' within the meaning of that word as used in the definition of larceny. The constructive possession of the coals by the prosecutor, in the case above cited, had commenced at the moment when they were placed in his cart, so that there was a subsequent taking of the coals by the prisoner—whose intention was beyond all question felonious.

Referable also to the principle just stated is the rule laid down by Sir M. Hale (*w*), that a wife cannot commit felony of the goods of the husband, because husband and wife are one person in law (*x*); a rule, however, which is subject to this qualification, that if a wife commit adultery and then take the goods of her husband with the adulterer, she is held to have thus determined her quality of wife, and is no longer looked upon as having any property in the goods, so that the person who assists her may be convicted of larceny (*y*).

Where property alleged to have been stolen came rightfully into possession of accused.

Again, there will not be a 'taking' sufficient to constitute larceny where the property alleged to have been stolen came into the hands of the prisoner *rightfully* in the first instance, and without an animus furandi, although it were afterwards wrongfully appropriated by him (*z*). For it is a

(*v*) See *Reg.* v. *Green*, 1 Dearsl. 323.

(*w*) 1 P. C. p. 513. See *Reg.* v. *Brooks*, 1 Dearsl. 184.

(*x*) 3rd Inst. 110.

(*y*) *Reg.* v. *Featherstone*, 1 Dearsl. 369; *Reg.* v. *Thompson*, 1 Den. C. C. 549.

(*z*) *Reg.* v. *Thristle*, 1 Den. C. C. 502, 504.

rule, in applying which however some nice distinctions must be noticed, that *furtum non est ubi initium habet detentionis per dominum rei* (*a*). If A. lends B. a horse for a particular journey, and B., having received the horse bonâ fide, afterwards rides away with it, he will not be guilty of larceny (*b*); though, if the owner of a horse deliver him to a servant or agent with orders that the latter shall take the horse to a distant place and there leave him, the possession would be deemed constructively to remain in the owner, and the agent would be guilty of theft in selling the horse, whilst in charge of it, contrary to his orders (*c*). And where the chattel in question was originally received by the accused animo furandi (*d*), or where a constructive possession of the goods confided to the prisoner's custody remained, at the time of the conversion, in their owner (*e*), the rule last stated does not apply.

If, however, goods are sold upon credit and delivered, no subsequent dealing with them by the vendee could amount to larceny (*f*); and if A. deliver to B. a watch to be regulated or repaired (*g*), or a horse to be agisted (*h*), and B. sell

(*a*) 3rd Inst. 107. As illustrating the rule above cited, see *Reg.* v. *Thomas*, 9 Car. & P. 741; *Reg.* v. *Goodbody*, 8 Car. & P. 665; *Reg.* v. *Evans*, Car. & M. 632; *R.* v. *Jackson*, 1 Mood. C. C. 119; *Reg.* v. *Adams*, 1 Den. C. C. 38.

(*b*) 1 Hale P. C., p. 504; Hawk. P. C., Bk. 1, Chap. 19, s. 2; *R.* v. *Banks*, Russ. & Ry. 441; *R.* v. *Pear*, 1 Leach, C. C. 212.

(*c*) Cr. L. Com., 4th Rep., pp. 54–5; 3rd Inst. 107, 108.

(*d*) *R.* v. *Stock*, 1 Mood. C. C. 87.

(*e*) *Reg.* v. *Harvey*, 9 Car. & P. 353; *Reg.* v. *Johnson*, 1 Dearsl. 310. As to *R.* v. *M'Namee*, 1 Mood. C. C. 368, see *Reg.* v. *Hey*, 1 Den. C. C. 606.

(*f*) See *Reg.* v. *Cohen*, 2 Den. C. C. 249 (where the goods were parted with on the express understanding that they were to be paid for at the time, and were taken by the prisoner animo furandi); *R.* v. *Campbell*, 1 Mood. C. C. 179.

(*g*) *Reg.* v. *Thristle*, 1 Den. C. C. 502; *R.* v. *Levy*, 4 Car. & P. 241.

(*h*) *R.* v. *Smith*, 1 Mood. C. C 473.

it, this is not larceny, because the watch in the one case and the horse in the other was delivered voluntarily, and not taken animo furandi. In *Pratt's case* (*i*) the prisoner, having become involved in pecuniary difficulties, had assigned his goods by deed to trustees for the benefit of his creditors. The trustees did not take actual manual possession under the assignment, but the prisoner remained in possession as before, and whilst thus in possession he removed some of the goods, intending to deprive his creditors of them. The jury here expressly found that the prisoner had not the care and custody of the goods as the agent of the trustees. And the Court of Criminal Appeal held, that, upon this finding, the prisoner, having been in lawful possession of the goods, could not be convicted of larceny.

Goods obtained in pursuance of contract.

In practice, a difficulty is sometimes experienced in determining whether goods alleged to have been stolen were not in fact obtained in pursuance of a contract between the prisoner and the prosecutor,—here care is necessary in scrutinising the facts adduced in evidence, and in ascertaining whether the alleged contract were not a mere pretence and fraud upon the prosecutor, part of a scheme for feloniously getting possession of his property, so as to render the *intention* which actuated the prisoner in doing so *felonious* (*k*). For instance, where the prisoner, a servant of the prosecutor, by a false statement induced a fellow servant, who was charged with the custody of certain wheat belonging to the prosecutor, to allow him to remove some portion of it, which he subsequently appropriated to his own

(*i*) 1 Dearsl. 360.

(*k*) *Reg.* v. *Morgan*, 1 Dearsl. 395; *R.* v. *Patch*, 1 Leach C. C. 238; *R.* v. *Moore*, Id. 314; *Reg.* v. *Wilson*, 8 Car. & P. 111.

use, these facts were held sufficient to evidence a larceny, because the artifice whereby the goods were in fact obtained negatived the idea of a bailment, and possession was obtained with intent permanently to convert the goods to the taker's own use (*l*).

It is, indeed, laid down that "all felony includes trespass," and that, if the party accused of stealing "be guilty of no trespass in taking the goods, he cannot be guilty of felony in carrying them away" (*m*). And it is, further, true that "to support an indictment for larceny the prosecutor must have such possession as would entitle him to bring trespass" (*n*). Hence, if goods are bailed and the bailee convert or dispose of them animo furandi, this act would not be punishable as larceny—because, being lawfully in possession of the chattel, the taking it would not constitute either a trespass or a felony. This proposition, which is of considerable practical importance, may be thus illustrated. If property be delivered for conveyance to a common carrier, the constructive as well as the actual possession of the proprietor ceases, and the carrier is not guilty of theft, although he fraudulently sell the property; but if he do any wrong inconsistent with the contract, as by breaking open the box or package containing the property, he puts an end to the contract, and the possession of the chattel revests at once in its proprietor; the possession, moreover, of the article in its original state was with the consent of the bailor and therefore lawful, but there was no consent on his part to the possession of the article in its altered state, so

Bailment.

Breaking bulk.

(*l*) *Reg.* v. *Robins*, 1 Dearsl. 418.

(*m*) Hawk. P. C., Book 1, Chap. 19, s. 1. See *Reg.* v. *Wynn*, 1 Den C C 365, 367.

(*n*) Per *Parke*, B., *Reg.* v. *Stear*, 1 Den. C. C. 355; *Reg* v. *Smith*, 2 Den. C. C. 449.

that by the alteration the bailment is determined; the property being thus revested, the carrier is held to be as guilty of theft in taking any part of such property as if he had, independently of any contract, taken it animo furandi from the possession of its owner (*o*).

The taking must be animo furandi.

Further, in order to constitute the offence of larceny, the 'taking' must have been *animo furandi*, and with intent to deprive the owner wholly of his property in the thing taken; and it will of course be for the jury in any particular case to determine whether the facts adduced in evidence really prove such an intent. Thus, in *Reg.* v. *Holloway* (*p*), the prisoner, a workman, employed in a tan-yard to dress leather, was indicted for stealing certain skins of that material, which it appeared from the finding of the jury that he took, "not with intent to sell or dispose of," but with a view to charging for them as if they had been dressed by himself, and so obtaining payment for them from his master,—upon this finding of the jury the Court held that the prisoner could not be convicted of larceny, because there had been no intent on his part to deprive the owner *wholly* of his property in the leather. "If," says *Alderson*, B., in the above case, "a servant takes a horse out of his master's stable and turns it out into the road, with intent to get a reward the next day by bringing it back to his master,

(*o*) Year Book, 13 Edw. 4, fol. 9 b; Judgm. *Fenn* v. *Bittleston*, 7 Exch. 159, 160; Cr. L. Com., 4th Rep., pp. 54, 55; *Reg.* v. *Cornish*, 1 Dearsl. 425; *Reg.* v. *Poyser*, 2 Den. C. C. 233; *R.* v. *Howell*, 8 Car. & P. 325; *Reg.* v. *Jenkins*, 9 Id. 38; *Reg.* v. *Stear*, 1 Den. C. C. 349.

(*p*) 1 Den. C. C. 370; 3rd Inst. 107. See *R.* v. *Phillips*, cited 2 East P. C., pp. 662, 663; *R.* v. *Holloway*, 5 Car. & P. 524; *Reg.* v. *Privett*, 1 Den. C. C. 193 (citing *R.* v. *Morfitt*, Russ. & Ry. 307; *R.* v. *Cabbage*, Id. 292); *Reg.* v. *Gruncell*, 9 Car. & P. 365; *Reg.* v. *Handley*, Car. & M. 547; *Reg.* v. *Richards*, 1 Car. & K. 532.

would that be larceny?" a question which might safely be answered in the negative, upon the simple ground that the facts here supposed would not evidence a felonious intent, i. e. an intent to deprive the owner wholly of his property in the thing taken (*q*). A person may, however, be guilty of larceny who takes the property of another and afterwards sells it to him again—provided the thief took it with the intention that it never should revert to the owner as his own property except by sale; if, for instance, A. takes a horse from B., wrongfully disguises it, and then sells it back to him again, this would be larceny. In cases of this sort (*r*), which are distinguishable from *Reg.* v. *Holloway* above cited, there is a clear intention to deprive the owner of his property in the thing taken, evidenced by a positive assertion of title at the time of resale.

A felonious intent could not, however, be inferred from a taking of property in mere thoughtlessness—by way of joke—or with a mischievous design other than that of depriving the owner of it. And where an assertion of property and ownership is meant by the taking, all semblance of a criminal intent manifestly disappears.

Appropriation of lost goods by finder.

Where goods of a third person, having been lost, are appropriated by the finder to his own use, such appropriation under certain circumstances will, whereas in others it will not—amount to larceny. It will be larceny if the finder takes the goods with the intention of wholly applying them to his own use—at the same time "reasonably believing that the owner can be found;" this is the rule laid

(*q*) See *Reg* v. *York*, 1 Den. C. C. 35; 1 Hale P. C., p. 599.

(*r*) See *Reg* v. *Hall*, 1 Den. C. C. 381; *Reg.* v. *Manning*, 1 Dearsl. 21.

down in *Reg.* v. *Thurborn* (*s*), where the Court observe, that, although in applying it questions of some nicety may arise, yet it will generally be ascertained whether the accused had reasonable belief that the owner could not be found, by evidence of his previous acquaintance with the ownership of the particular chattel—the place where it is found, or the nature of the marks upon it,—in *some* cases the existence of such a belief in the mind of the finder would be at once obvious—in others it would appear only after an examination into the particular circumstances. Thus—if a horse is found feeding on an open common or on the side of a public road, or a watch is found *apparently hidden* (*t*) in a hay-stack—the taking of either description of property would be larceny, because the taker could have no right to presume that the owner did not know where to find it.

If, on the other hand, a man finds goods which have been actually lost, or which may reasonably be supposed by him to have been lost, and appropriates them with intent to take the entire dominion over them, really believing, when he takes them, that the owner cannot be found, this is not larceny (*u*); nor would it be, if the taking occurred in such a place and under such circumstances as that the owner might be reasonably presumed by the taker to have abandoned his property in the particular chattel, or at least not to know where to find it. In order to appreciate correctly the true grounds upon which the distinction just pointed out depends, we must look, not so much to abstract legal prin-

(*s*) 1 Den. C. C. 387, 394, 396. See also *Reg.* v. *Peters*, 1 Car. & K. 245, 247; *Reg.* v. *Mole*, Id. 417.

(*t*) I. e. under such circumstances as may fairly lead to the inference that it was hidden.

(*u*) Judgm. 1 Den. C. C. 396.

ciples, as to motives of expediency, in which so much of our criminal law has doubtless originated; and we shall then see that cases of abstraction of lost property being of rare occurrence, when compared with violations of property in the possession of an owner, there was in the former case no need of so severe a penalty as in the latter; and the civil remedy, viz. by action of trover, for recovering possession of the chattel misappropriated, was therefore deemed sufficient (*x*). It is moreover a rule of our criminal law, formerly cited (*y*), that *actus non facit reum nisi mens sit rea* (*z*); whence it follows that the guilt or innocence of an accused person must depend on the circumstances of the particular case *as they appear to him*,—so that the crime of larceny cannot be committed unless the goods alleged to have been feloniously taken appear to have an owner, and further, as may be seen by looking at the definition of larceny already given (*a*), unless the taker must have known or believed that the taking was invito domino,—which could not be if the property were believed to have been abandoned.

The law thus laid down in *Thurborn's case*, as applicable where goods apparently lost, or at all events without any visible owner, are appropriated by the finder to his own use, was recognised by the Court of Criminal Appeal in *Reg.* v. *Preston* (*b*); which shews, that if a man were to pick up in the street a bank note marked with the owner's name, so that he could easily be discovered, with the innocent intention of finding out the owner and restoring him the note, but were afterwards to change his mind and to

(*x*) Judgm. 1 Den. C. C. 393. Inst. 107.
(*y*) Ante, pp. 876, 942, n. (*e*).
(*z*) Judgm. 1 Den. C. C. 389; 3rd
(*a*) Ante, p. 948.
(*b*) 2 Den. C. C. 353.

convert the note to his own use, this would not amount to larceny.

In *Reg.* v. *West* (c) the accused was charged with stealing a purse and its contents under these circumstances: The prosecutor, after making a purchase at the prisoner's stall at market in a country town, accidentally left his purse upon it; the prisoner thereupon appropriated it to her own use, and, on the prosecutor demanding it from her, denied all knowledge of it. The jury found that the prisoner took up the purse knowing that it was not her own, and intending at that moment to appropriate it. They also found that the prisoner did not then know who was its rightful owner. The prisoner having been convicted, the Court held the conviction right, observing, that if there had been evidence that the purse and its contents were lost property according to the strict meaning of that term, and the jury had so found, they ought further to have been asked whether the prisoner had reasonable means of finding the owner, or reasonably believed that the owner could not be found. . . . There is a clear distinction, they further remarked, between property *lost* and property merely *mislaid*, or put down and left by mistake under circumstances which would enable the owner to know the place where he had left it, and to which he would naturally return for it.

As shewing what would amount to larceny under circumstances somewhat analogous to those latterly considered, may be specified the following cases:—where a hackney coachman abstracts the contents of a parcel which has been accidentally left in his coach by a passenger whose address he could easily ascertain;—or where a tailor finds and ap-

(c) 1 Dearsl. 402.

plies to his own use a pocket-book left in a coat sent to him for repair by a customer;—or where the purchaser of an article of furniture, as a desk, at a sale by auction, discovers valuables in it and appropriates them to his own use—provided in this case that the purchaser either had express notice that he was not to have any title to the contents of the desk if there happened to be anything in it, or provided, without such express notice, that he had no ground to believe that he had bought the contents, and had reason to think, as he most likely would have, that the owner could be discovered (*d*).

Doctrine of relation.

But although it be true, that, where the taking of a chattel is in its inception lawful, a subsequent conversion of the thing taken, however tortious or wrongful it be in a moral point of view, does not constitute the offence of larceny (*e*); yet, if the taking be in itself wrongful and unlawful, albeit without any felonious intent, a subsequent conversion of it with such intent will suffice to constitute the offence in question. Thus, in *Reg.* v. *Riley* (*f*), the prisoner was indicted for stealing a lamb under the following circumstances: it appeared that, having in the first instance put twenty-nine black-faced lambs, belonging to himself, into a field which contained ten white-faced lambs of the prosecutor, he afterwards took away his own lambs and offered them for sale as amounting in number to twenty-nine; the proposed purchaser however, on counting

(*d*) Judgm. *Merry* v. *Green*, 7 M. & W. 623, and cases there cited; Judgm. *Reg.* v. *Thurborn*, 1 Den. C. C. 394–5. The civil rights of the finder of lost property, as against any one save the true owner, will appear from *Bridges* v. *Hawkesworth*, 21 L. J., Q. B., 75; *Merry* v *Green*, supra; *Armory* v. *Delamirie*, cited ante, pp. 154, 802.

(*e*) Judgm. *Reg.* v. *Thurborn*, 1 Den. C. C. 397; *Reg.* v. *Preston*, 2 Id. 353.

(*f*) 1 Dearsl. 149.

the lambs, pointed out to the prisoner that there were in fact thirty in the flock, which included one white-faced lamb belonging to the prosecutor. The prisoner nevertheless sold them all to the other party on his own individual account. Now, on the trial of this case, the jury found that at the time of leaving the field the prisoner did not know that the prosecutor's lamb was in the flock, but that he had a felonious intention when he sold it. The question accordingly was, could the prisoner, upon the above facts and finding, be convicted of larceny? and the Court of Criminal Appeal held that he might be so, because the original taking was wrongful,—for, assuming that the prisoner was ignorant of the fact of the lamb being in his flock when he drove it from the field, the so driving it away and keeping it was a tortious act for which trespass (*g*) would have lain, and this act became felonious when the prisoner, knowing that the lamb in question was not his own, sold it (*h*). Cases thus distinctly illustrating the practical operation of the doctrine of relation in felony, do not very frequently present themselves in our Reports.

(*g*) Ante, p. 956.

(*h*) Although it is not proposed to advert to points of a purely technical character connected with the indictment for larceny, it may be observed, that, by the stat. 14 & 15 Vict. c. 100, s. 16, "it shall be lawful to insert several counts in the same indictment against the same person for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person, within the space of six calendar months from the first to the last of such acts, and to proceed thereon for all or any of them." And, by s. 17 of the same Act, "if, upon the trial of any indictment for larceny, it shall appear that the property, alleged in such indictment to have been stolen at one time, was taken at different times, the prosecutor shall not, by reason thereof, be required to elect upon which taking he will proceed, unless it shall appear, that there were more than three takings, or that more than the space of six calendar months elapsed between the first and the last of such takings;

It has now been shewn, that, to sustain an indictment for larceny, proof must be given that the specific chattel alleged to have been stolen was taken out of the possession, actual or constructive, of its owner—invito domino and animo furandi—and that the intention in taking it was wholly to deprive the owner of his property therein. Another ingredient, not as yet specifically noticed, in the crime of larceny, is the 'carrying away' or 'asportation' of the said chattel; for, to constitute this offence, there must not only be a *taking* but a *carrying away*. A bare removal, however, from the place in which he found the goods, though the thief does not quite make off with them, is a sufficient asportation: as if a man be leading another's horse out of a close and be apprehended in the fact (*i*); or if a servant, animo furandi, take his master's hay from his stable and put it into his master's waggon (*k*); or if a thief, intending to steal plate, takes it out of a chest in which it was, and lays it down upon the floor, but is surprised before he can make his escape with it (*l*); or, if gas be fraudulently severed and abstracted from the main against the will and without the knowledge of the Company who supply it (*m*). In any of these cases there is a sufficient 'asportation' (*n*), within the meaning of that term as used in the definition of simple larceny.

The asportation—what.

and, in either of such last-mentioned cases, the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six calendar months, from the first to the last of such takings."

(*i*) 4 Bla. Com., p. 231; 3 Inst. 108, 109.

(*k*) *Reg.* v. *Gruncell*, 9 Car. & P. 365.

(*l*) *R.* v. *Simson*, Kel. 31; *R.* v. *Walsh*, 1 Mood. C. C. 14; *Reg.* v. *Samways*, 1 Dearsl. 371.

(*m*) *Reg.* v. *White*, 1 Dearsl. 203.

(*n*) As to which, see, further, 2

Lastly, in connection with the taking and asportation, as constituent ingredients in larceny, it may be well to add, that, if a man, by means of an innocent agent, does an act which amounts in law to this crime, the employer, and not the innocent agent, is the person accountable for that act (*o*). And further, should it appear, on the trial of one accused of larceny, that the asportation was not completed, the jury may, if the facts proved justify such a finding, convict of the attempt to steal (*p*); for which moreover, as being a misdemeanor at common law, an indictment might clearly be preferred (*q*).

Larceny effected by means of innocent agent.

Attempt to steal.

The offence of receiving goods, monies, &c., knowing them to have been stolen (*r*), is sometimes scarcely distinguishable from that of stealing; as, for instance, where the thief and receiver are together when the felony is committed, and the thing taken is transferred by the former to the latter. It has been held, indeed, on the one hand, that a person who, whilst waiting outside a house, receives goods which a confederate is stealing in the house, is a *principal* (*s*); and, on the other hand, that if the goods be removed some little distance from the house before they are delivered into the prisoner's hands, he will be indict-

Receiving stolen goods, &c

East P. C., p. 556; *R.* v *Pearson*, 4 Car. & P. 572; *R.* v. *Walsh*, cited Id 576, n. (*d*).

(*o*) Per *Erle*, J., *Reg.* v. *Bleasdale*, 2 Car. & K. 768.

(*p*) Ante, p. 894.

(*q*) See *Reg.* v. *Ferguson*, 1 Dearsl. 427.

(*r*) By the 7 & 8 Geo. 4, c. 29, s. 54, if any person shall receive any chattel, money, valuable security, or other property whatsoever, the stealing or taking whereof shall amount to a felony either at common law or by virtue of the above Act, such person knowing the same to have been feloniously stolen or taken, every such receiver shall be guilty of felony, and may be indicted and convicted, either as an accessory after the fact, or for a substantive felony.

(*s*) *R.* v. *Owen*, 1 Mood. C. C. 96. "If one burglar stands outside a

able as a *receiver* only (*t*). With a view to removing in some measure the difficulty caused by the nice distinction just adverted to, the Stat. 11 & 12 Vict. c. 46, s. 3, enacts, that, in every indictment for feloniously receiving stolen property, it shall be lawful to add a count for feloniously stealing the same, and vice versâ.

To constitute the offence of receiving stolen goods, it must be shewn in evidence that the goods were stolen, and that they were received by the prisoner with knowledge that they had been stolen (*u*). If goods are stolen and then returned by the owner to the thief with directions to sell them to the prisoner, who had been previously suspected of receiving stolen goods, and the thief does so sell them and hands over the proceeds to the former, the prisoner could not under these circumstances be convicted as a receiver; for although such a case would seem to come within the words, it does not come within the spirit, meaning, and intention of the Statute (7 & 8 Geo. 4, c. 29), because the goods which had been stolen had subsequently passed into the possession and were under the control of the real owner, and, being so in his possession and under his control, were transferred by his authority to the prisoner (*v*).

Again—"the receipt of stolen goods knowingly," as

window while another plunders the house and hands out the goods to him, he surely could not be indicted as a receiver:" per *Alderson*, B., *Reg.* v. *Perkins*, 2 Den. C. C 461.

(*t*) *R.* v. *King*, Russ. & Ry. 332. As to the evidence which may suffice to support an indictment for receiving stolen goods, see *Reg.* v. *Hobson*, 1 Dearsl. 400; *R.* v. *King*, Russ. & Ry. 332; *R.* v. *Walkley*, 4 Car. & P. 132; 2 East P. C., pp. 767--8.

(*u*) See the stat. 7 & 8 Geo. 4, c. 29, ss. 54, 55.

(*v*) *Reg.* v. *Dolan*, 1 Dearsl. 436, (overruling *R.* v. *Lyons*, Car. & M. 217).

remarked by Lord *Denman*, C. J. (*w*), "does not of necessity comprise any series of acts; on the contrary, that offence is not committed at all unless the receipt and the knowledge are simultaneous." The receiving, however, must be proved—i. e. the possession—actual or constructive—must be shewn to have passed or been transferred to the prisoner; and therefore, where stolen fowls were forwarded by coach in a hamper without any address, but with instructions that it would be called for, and it was accordingly called for by the wife of one of the prisoners, who, however, on applying for it, was apprehended before it had been delivered to her, it was held that the wife could not be convicted of receiving the stolen property, because she could not be said, by merely claiming the fowls which never were actually or potentially in her possession, to have in fact or law received them (*x*). In order to sustain an indictment for receiving stolen goods, it is not indeed necessary to shew manual possession of them by the prisoner, provided they be within his control (*y*), or constructively in his possession. The question, what is such a possession as will suffice to support a conviction for this offence, was much discussed in *Reg.* v. *Wiley* (*z*), where a difference of opinion existed amongst the judges in regard to it. Although, moreover, 'receiving' implies "a taking into possession, actual or constructive," (*a*) there may be much difficulty in accurately discriminating between the receipt of goods and the mere intention to receive them. "In all these cases boundary lines," remarks *Alderson*, B. (*b*), "are matters of great

(*w*) *Reg.* v. *Button*, 11 Q. B. 943-4.

(*x*) *Reg.* v. *Hill*, 1 Den. C. C. 453.

(*y*) *Reg.* v. *Smith*, 1 Dearsl. 494.

(*z*) 2 Den. C. C. 37.

(*a*) Per *Parke*, B., Id. 49.

(*b*) Id. ibid.

nicety, and seem to unthinking persons to involve absurd and frivolous distinctions; but those who are practically acquainted with the administration of the law have daily experience of their necessity, and know that without them acts and principles essentially different from each other in nature and operation would be confounded together."

In *Reg.* v. *Brooks* (*c*) the prisoner, a married woman, was indicted for receiving stolen goods; it appeared in evidence that the goods in question had been stolen by the prisoner's husband from his employer, and were afterwards taken home and given to his wife by him: it was held that the prisoner could not properly be convicted of the offence charged (*c*); for there was not under such circumstances a 'receiving' of the goods—husband and wife being for many purposes regarded as one person in law (*d*).

Obtaining goods or money by false pretences.

The statutory offence of *obtaining goods or money by false pretences* depends upon the 7 & 8 Geo. 4, c. 29, s. 53, which enacts "that if any person shall by any false pretence obtain (*e*) from any other person any chattel, money, or valuable security (*f*) with intent to cheat or defraud any person of the same, every such offender shall be guilty of a misdemeanor," and punishable as the Act directs. Between the crime just specified and that of larceny, the most intelligible distinction seems to be this:—In larceny the owner of the thing stolen has no intention to part with his pro-

(*c*) 1 Dearsl. 184. See *Reg.* v. *Matthews*, 1 Den. C. C. 596.

(*d*) Ante, p 596.

(*e*) The word 'obtain' here used means the same as the word 'get,' in its sense of 'acquire;' per *Maule*, J., 1 Dearsl 239.

(*f*) See *Reg* v *Greenhalgh*, 1 Dearsl. 267; 14 & 15 Vict. c. 100, s. 18; *Reg* v. *Leonard*, 1 Den. C. C. 304.

The ownership of the property alleged to have been fraudulently obtained, must be stated in the indictment *Sill* v *Reg.*, 1 Dearsl 132

perty therein to the person taking it; in the former case the owner has such an intention, but the money or chattel is obtained from him by fraud (*g*). "If," says *Parke*, B. (*h*), "a person, through the fraudulent representations of another, delivers to him a chattel, intending to pass the property in it, the latter cannot be indicted for larceny, but only for obtaining the chattel under false pretences."

Where, then, a man represents as an existing fact that which is not an existing fact, and so gets the money or chattels of another, that is a false pretence (*i*), it being for the jury to say "whether or not the pretence used were the means of obtaining the property" (*k*). An instance of a false pretence within the statute presents itself where a person goes to a shop and says 'that he is sent by some particular customer for such and such goods,' which upon the faith of what he says are handed to him; or where the secretary of a benefit society obtains money from one of its members by representing that a certain amount, exceeding that actually due, is owing by him to the society (*l*); or where money is obtained by means of a begging letter setting forth false statements as to the name and circumstances of the accused (*m*); or where A., the accused, falsely represents that he is connected with B., a person of known opulence, and on the faith of such representation obtains for himself property (*n*). So, the fraudulently offering in

(*g*) Per *Talfourd*, J., *White* v. *Garden*, 10 C. B. 927; *Reg.* v. *Barnes*, 2 Den. C. C. 59.

(*h*) *Powell* v. *Hoyland*, 6 Exch. 70; *R.* v. *Adams*, Russ. & Ry. 225.

(*i*) *Reg.* v. *Woolley*, 1 Den. C. C. 559; *Reg.* v. *Welman*, 1 Dearsl. 188; *Reg.* v. *Archer*, Id. 449.

(*k*) 2 Russ. Cr., 3rd edit., p 289, n. (*g*).

(*l*) *Reg.* v. *Woolley*, 1 Den. C. C. 559.

(*m*) *Reg.* v. *Jones*, 1 Den. C. C. 551.

(*n*) *Reg.* v. *Archer*, 1 Dearsl. 449.

payment a spurious note, not within the operation of the statute law as to forgery, under the pretence that it is a Bank of England note, would be a false pretence within the Act of Geo. 4 (*o*). It is not, indeed, necessary that the false pretence should be in words, it may be evidenced by the conduct and acts of the accused party, ex. gr. by the fact of the prisoner going to a shop in Oxford or Cambridge dressed in the academical costume, and ordering goods, although not being a member of the University; for this would be evidence whence a jury might infer a pretence that he was such a member (*p*).

To support an indictment for false pretences there must, however, be a knowingly false statement of a supposed bygone or existing fact made with intent to defraud, and an obtaining of the money by means of that representation (*q*). A mere representation as to some future fact would not be within the statute, because in this latter case the party addressed has an opportunity of exercising his judgment on the probability of its happening (*r*). Neither does a mere falsehood told by way of excuse (*s*), although goods be obtined thereby—nor a false statement by the party charged, that he will do or means to do a particular act, suffice to con-

(*o*) *Reg.* v. *Coulson*, 1 Den. C. C. 592; *R* v. *Parker*, 2 Mood. C. C. 1.

(*p*) *R.* v. *Barnard*, 7 Car. & P. 784; *R.* v. *Story*, Russ. & Ry. 81.

(*q*) Per *Jervis*, C. J., *Reg.* v. *Welman*, 1 Dearsl. 198; *Reg.* v. *Hewgill*, Id. 315.

(*r*) Per Lord *Campbell*, C. J., *Reg.* v. *Woolley*, 1 Den. C. C. 563-4, where the following question is put by the counsel for the prisoner:—"If A. tells B. that he owes him 5*l.*, and B., though really owing him nothing, pays him 5*l.*, is that a false pretence?" To which Lord *Campbell* answers,—"If a tradesman, knowing that a customer owes him nothing whatever, says that he owes him 5*l.*, and gets the money, I think he comes within the statute." See also *R.* v. *Villeneuve*, 2 East P. C. 830; *R.* v *Goodhall*, Russ. & Ry. 461.

(*s*) *R.* v. *Wakeling*, Russ. & Ry. 504

stitute a false pretence (*t*). Nor could a mere fraudulent overcharge in respect of work done be made the subject-matter of an indictment (*u*). Though where the prisoner had committed a fraud on the sale of a cheese, by pretending that a sample which he had given the prosecutor to taste was part of the cheese actually offered for sale, whereas in truth it was taken from a cheese of a very superior quality, and thus obtained money from the prosecutor—proof of this fraud was held sufficient to support an indictment for obtaining money by false pretences: although it was argued, that, if so, an indictment "would lie in every case of a fraudulent sale by sample which did not correspond with the bulk" (*v*).

Even assuming that a false pretence can be proved, it must further be shewn that thereby the prisoner obtained from the prosecutor the chattel or money laid in the indictment with intent to defraud, although it is not necessary to allege or prove that the intent was to defraud any particular person (*w*); nor, in an indictment for obtaining money by false pretences, need it be stated that the false pretence was made with the intention of obtaining the money, if it be proved that in fact the party charged did intend to obtain it, made the false pretence, and did thereby obtain it (*x*). And further, *Garrett's case* (*y*) shews clearly

(*t*) See *Reg.* v. *Johnston*, 2 Mood. C. C. 254.

(*u*) *Reg.* v. *Oates*, 1 Dearsl. 459.

(*v*) *Reg.* v. *Abbott*, 1 Den. C. C. 273; *Reg.* v. *Kenrick*, 5 Q. B. 49; *Reg.* v. *Eagleton*, 24 L. J., M. C., 158; *S. C.* 1 Dearsl. 376; *R.* v. *Wheatley*, 2 Burr. 1128, cited ante, p. 867. The above cases are important, in reference to the distinction, not always clearly discernible, between the offence of cheating at common law, and the statutory misdemeanor commented on in the text.

(*w*) 14 & 15 Vict. c. 100, s. 8.

(*x*) *Hamilton* v. *Reg.*, 9 Q. B. 271, 277.

(*y*) 1 Dearsl. 232, 241, 242.

that the statute contemplates the case of money being obtained according to the wish and for the advantage, or at all events to gain some object, of the party who makes the false pretence—that is, the obtaining must be either by the party's desire or intention, or for his benefit.

Inasmuch as a failure of justice frequently arose from the subtle distinction existing between larceny and fraud, for remedy thereof, it was by the 7 & 8 Geo. 4, c. 29, s. 53 (*z*), provided that if, upon the trial of any person indicted for the misdemeanor of obtaining goods or money by false pretences, "it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor;" and "no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts." I need merely add, in reference to the offence which has been latterly under consideration, that although the attempting to obtain goods or money by false pretences is a misdemeanor at common law (*a*), yet, as remarked in a recent case (*b*), the bare intention so to do is not criminal; some act is required to make it so, nor would all acts towards committing the misdemeanor in question be indictable; "acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are."

Embezzlement.

Let us, in the next place, consider the offence of *embez-*

(*z*) See also the 14 & 15 Vict. c. 100, s. 12, cited ante, p. 893.

(*a*) See *Reg.* v. *Garrett*, 1 Dearsl. 232; *Reg.* v. *Marsh*, 1 Den. C. C. 505.

(*b*) *Reg.* v. *Eagleton*, 19 Jur. 940, 944; *S. C.*, 1 Dearsl. 376; 24 L. J., M. C., 158.

zlement (*c*) depending upon the statute 7 & 8 Geo. 4, c. 29, s. 47, which enacts, that, "if any clerk or servant, or any person employed for the purpose or in the capacity of a clerk or servant, shall *by virtue of such employment* (*d*) receive or take into his possession any chattel, money, or valuable security, *for or in the name or on the account of his master* (*e*), and shall fraudulently embezzle the same, or any part thereof," he "shall be deemed to have feloniously stolen the same from his master, although such chattel, money, or security was not received into the possession of such master otherwise than by the actual possession of his clerk, servant, or other person so employed." Now there is sometimes no little practical difficulty in distinguishing the offence of embezzlement thus constituted from that defined by the 46th sect. of the Act just mentioned, which assigns a particular punishment to the stealing by a clerk or servant of any chattel, money, or valuable security; "belonging to or in the possession or power of his master." The distinction between the two offences of *larceny by a servant* and *embezzlement* pointed out by a learned writer on our criminal law (*f*) is this: "if the servant received the pro-

Larceny by clerk or servant.

(*c*) To "embezzle" signifies "to appropriate fraudulently to one's own use what has been entrusted to one's care, custody, or management:" Webst. Dict. ad verb.—"Embezzlement" is "the act of appropriating to oneself that which is received in trust for another:" Johns. ad verb. See *Reg.* v. *Wortley*, 2 Den. C. C. 333.

As illustrating the difference between a mere breach of trust and embezzlement, see *Reg.* v. *Gibbs*, 1 Dearsl. 445.

(*d*) See *Reg.* v. *Adey*, 3 Car. & K. 339; *Reg.* v. *Welch*, 1 Den. C. C. 199.

(*e*) See *Reg.* v. *Harris*, 1 Dearsl. 344; *Reg.* v. *Beaumont*, Id. 270; *Reg.* v. *Townsend*, 1 Den. C. C. 167.

(*f*) See Mr. Greaves's edition of Lord Campbell's Acts, p. 17; Per *Gurney*, B., *R.* v. *Grove*, 1 Mood. C. C. 449; *Reg.* v. *Hawkins*, 1 Den. C. C. 584; *Reg.* v. *Welch*, 1 Den. C. C. 199.

perty and converted it to his own use *before* it came to the possession of the master, the offence is embezzlement;" whereas "if the property had come to the possession of the master, and the servant *afterwards* converted it to his own use, it is larceny." Thus, if a butler, having the care and custody of his master's plate, should receive plate from the silversmith for his master at his master's house, and afterwards fraudulently convert it to his own use before it had in any way other than by his act of receiving it come into the possession of the master, the butler would be guilty of larceny (*g*). But if a servant, whose duty it is to receive property and pass it on to another servant, converts that property to his own use, he is guilty of embezzlement, because the property when so converted is in transitu merely towards the master, and not in his actual or constructive possession (*h*).

In *Gill's case* (*i*) the facts were these:—the accused was the prosecutor's servant, and, being suspected of dishonesty, was detected in this manner:—His master (the prosecutor), who was a licensed victualler, gave to a third person some marked money with which to purchase spirits at his house, where the prisoner was employed as barman, his duty consequently being to receive money tendered in payment for any article sold to a customer by him, and to deposit it in the till; some of the money thus marked not having been placed in the till, but being found in the prisoner's possession, he was prosecuted and found guilty of embezzlement, and was held to have been

(*g*) See *Reg.* v. *Watts*, 2 Den. C. C. 14.

(*h*) Judgm. *Reg.* v. *Watts*, 2 Den. C. C. 30; *Reg.* v. *Masters*, 1 Den. C. C. 332.

(*i*) 1 Dearsl. 289, following *R.* v. *Hedges*, 2 Leach. C. C. 1033. See *Reg.* v. *Goodenough*, 1 Dearsl. 210.

properly convicted of that crime—the money appropriated by him having previously been out of the *possession*, either actual or constructive, of the prosecutor, and being in transitu only towards him when fraudulently converted to his own use by the prisoner. Had the marked money in this case actually reached and been received into the prosecutor's possession, the prisoner, in conformity with what has been above said, would have been properly indictable for larceny as a servant under the 46th section of the statute (*j*).

The distinction above pointed out between embezzlement and larceny by a servant need not here further be adverted to, being now of much less practical importance than formerly it was by reason of the 13th section of the statute 14 & 15 Vict. c. 100, which enacts, that thenceforth a person indicted for one of these offences shall not be entitled to an acquittal, should the evidence at the trial establish that he was guilty of the other; ex. gr. if when indicted for larceny it shall be shewn that he was in fact guilty of embezzlement. It is, however, well worthy of notice, that, notwithstanding the above useful statutory provision, the ends of justice may yet be frustrated by reason of the judge or jury taking a wrong view of the bearing and tendency of the facts adduced in evidence, and convicting the prisoner of that offence—whether embezzlement or larceny—which in point of law he had *not* committed (*k*).

(*j*) 7 & 8 Geo. 4, c. 29. cited ante, p. 973.

(*k*) Besides the statutory provision noticed in the text, respecting the crime of embezzlement by a clerk or servant, the 7 & 8 Geo. 4, c. 29 contains various sections (ss. 49, 50, 52) applicable to the particular case of embezzlement by bankers (*Reg.* v. *Strahan and Others*, not yet reported), brokers (*R.* v. *White*, 4 Car. & P. 46), and others. There are

Intimately connected with the offence of simple larceny are some other crimes of a more serious character, in which the felonious taking of chattels is accompanied with some degree of force or violence to the person or to property, as to each of which classes of cases a few brief observations only will be offered.

Larceny from the person.

Robbery.

"*Larceny from the person,*" says Blackstone (*l*), "is either by privately stealing; or by open and violent assault, which is usually called *robbery,*"—the difference between the two offences here specified being thus clearly set forth:—for 'robbery,' even in its least aggravated form (*m*), is "an open and violent larceny from the person," or the felonious and forcible taking, from the person or in the presence of another, of goods or money against his will by violence or by putting him in fear (*n*), whereas a conviction for stealing from the person will be sustained by evidence of a clandestine taking and removal of property from the person by ever so small a space (*o*).

In order to sustain an indictment for *robbery,* the prosecutor must prove either that he was actually in bodily fear from the defendant's actions at the time of the rob-

also specific enactments in regard to embezzlement by factors (5 & 6 Vict. c. 39, s. 6) and bankrupts (12 & 13 Vict. c. 106, s. 254).

(*l*) 4 Com., p. 242. See 7 Will. 4 & 1 Vict. c. 87, s. 5.

(*m*) See 7 Will. 4 & 1 Vict. c. 87, ss. 2, 3.

(*n*) 4 Bla. Com., p. 242; Judgm. *De Rothschild* v. *The Royal Mail Steam Packet Co.*, 7 Exch. 742; Foot. R., pp. 128, 129; *R.* v. *Mason*, Russ. & Ry. 419; *Reg.* v. *Walls*, 2 Car. & K. 214; *R.* v. *Gnosil*, 1 Car. & P. 304; *R.* v. *Moore*, 1 Leach C. C. 325.

In some statutes the word 'robbery' is used in a sense much more comprehensive than that above assigned to it, so as to include a taking without force: Judgm. 7 Exch. 742.

(*o*) *Reg.* v. *Simpson*, 1 Dearsl. 421 (where *Jervis*, C. J., doubts *R.* v. *Thompson*, 1 Ry. & Mood. 78); *R.* v. *Lapier*, 1 Leach C. C. 60; *R.* v. *Farrell*, Id. 362.

bery, or he must prove circumstances accompanying the robbery, such as in common experience are likely to induce a man to part with his property for the safety of his person; for although the putting in bodily fear is said to be a necessary ingredient in the constitution of this offence, yet the law *in odium spoliatoris* will presume fear where there appears to be a just ground for it (*p*).

It may be well to add, that an individual may be convicted upon an indictment for stealing from the person, although the evidence adduced would have sufficed to sustain a charge of robbery (*q*). And it should further be noticed, that an indictment will lie by the statute law (*r*) for an assault with intent to rob, which is thereby expressly made a felony.

Stealing in a dwelling-house—house-breaking—burglary.

The offences involving or akin to larceny—which moreover as presenting some analogies to each other may properly be grouped and classified together in the mind—are these:—Stealing in a dwelling-house, house-breaking, and burglary. The offences just specified being in various important particulars regulated by the statute law, it becomes necessary to premise any remarks respecting them by a brief enumeration of the enactments which concern them.

(*p*) Fost 128, 129.

(*q*) *R.* v. *Pearce*, Russ. & Ry. 174; *R.* v. *Robinson*, Id. 321.

(*r*) 10 & 11 Vict. c. 66, s. 6.

Also, on an indictment for robbery, the prisoner may be convicted of an assault with intent to rob: 14 & 15 Vict. c. 100, s. 11. See *Reg.* v. *Reid*, 2 Den. C. C. 88; *Reg.* v. *Mitchell*, 2 Den. C. C 468; *S. C.*, 1 Dearsl. 19, n.

The general rule is, that on an indictment for any offence of a compound nature, there may be a conviction of any one of the criminal elements of which such offence is composed, provided the two offences be equal in degree, i. e. be both felonies or both misdemeanors; per *V. Williams*, J., *Reg.* v. *Bird*, 2 Den. C. C. 116.

It is provided then that whoever

— shall steal in any dwelling-house any chattel, money, or valuable security to the value in the whole of 5*l.* or more (*s*);

—or, shall steal any property in any dwelling-house, and shall by any menace or threat put any one being therein in bodily fear (*t*);

—or, shall break and enter any dwelling-house and steal therein any chattel, money, or valuable security (*u*);

—or, shall enter the dwelling-house of another with intent to commit felony, or being in such dwelling-house shall commit any felony, and shall in either case break out of the said dwelling-house in the night time (*x*), i. e. between nine o'clock in the evening and six o'clock in the morning of the succeeding day (*y*);

—or, shall burglariously break and enter into any dwelling-house, and shall assault with intent to murder any person being therein, or shall stab, cut, wound, beat, or strike any such person (*z*);

—shall be guilty of felony and punishable accordingly (*a*).

In regard to the meaning of the word 'dwelling-house' above used, which has on various occasions been discussed (*b*), it is now provided and enacted (*c*), that "no building, although within the same curtilage (*d*) with the

(*s*) 7 & 8 Geo. 4, c. 29, s. 12.

(*t*) 7 Will. 4 & 1 Vict. c. 86, s. 5.

(*u*) 7 & 8 Geo. 4, c. 29, s. 12.

(*x*) 7 & 8 Geo. 4, c. 29, s. 11.

(*y*) 7 Will. 4 & 1 Vict. c. 86, s. 4.

(*z*) 7 Will. 4 & 1 Vict. c. 86, s. 2.

(*a*) The punishment awarded to each of the offences above specified is prescribed by the statutes 7 & 8 Geo. 4, c. 29, ss. 11, 12; 7 Will. 4 & 1 Vict. c. 86, ss. 1—3, and c. 90, s. 3; 9 & 10 Vict. c. 24, s. 1.

(*b*) Post, p. 981.

(*c*) 7 & 8 Geo. 4, c. 29, s. 13.

(*d*) Curtilage, i. e., a court-yard, inclosure, or piece of land near and belonging to a dwelling-house: Toml. Law Dict.; Webst Dict., ad verb.

dwelling-house and occupied therewith, shall be deemed to be part of such dwelling-house for the purpose of burglary" or for any of the purposes therein stated, "unless there shall be a communication between such building and dwelling-house, either immediate or by means of a covered and inclosed passage leading from the one to the other" (*e*).

Stealing in a dwelling-house.

The offence of stealing in a dwelling-house may be of various degrees, according as the value of the chattel stolen is or is not below 5*l.* in amount (*f*)—in the former of which cases it is punishable merely as simple larceny—or as the stealing is accompanied or not by any menace or threat putting any person being in such dwelling-house in bodily fear (*g*); either of these two latter offences is, however, justly regarded by our law as a crime of less enormity than that of breaking into a dwelling-house and stealing therein, and, a fortiori, than that of breaking into a dwelling-house by night with intent to commit felony. In order to insure a conviction for the offence of stealing in a dwelling-house to the value of 5*l.*, it is of course necessary to establish in evidence—1. the larceny; 2. that the value of the thing taken reached the statutory limit; 3. that the larceny was committed within the dwelling-house of the

(*e*) The 7 & 8 Geo. 4, c. 29, s. 14, is applicable where "any person shall break and enter any building, and steal therein any chattel, money, or valuable security, such building being within the curtilage of a dwelling-house and occupied therewith, but not being part thereof" within the meaning of the Act cited in the text: see *Reg.* v. *Gilbert*, 1 Car. & K. 84. The following section (s. 15) of the statute applies to the case of breaking and entering any shop, warehouse, or counting-house, and stealing therein any chattel, money, or valuable security: see *Reg.* v. *Potter*, 2 Den. C. C. 235.

(*f*) 7 & 8 Geo. 4, c. 29, s. 12.

(*g*) 7 Will. 4 & 1 Vict. c. 86, s. 5; *R.* v. *Etherington*, 2 Leach C. C. 671; *R.* v. *Jackson*, 1 Leach C. C. 269.

prosecutor or some other person (*h*), and, that the chattel stolen was, in technical phraseology, "under the protection of the dwelling-house" (*i*).

House-breaking.

The remarks which immediately follow respecting burglary will, so far as they concern the meaning of the word 'dwelling-house,' and of the terms 'breaking' and 'entering,' be found applicable to the offence of house-breaking; it will suffice therefore here to notice, that the breaking of a house in the day-time must be accompanied with some actual larceny (*k*) in order to constitute the offence technically known as house-breaking. The breaking and entering a dwelling-house in the daytime with intent to steal therein is, however, indictable as a misdemeanor at common law (*l*).

Burglary.

Burglary at common law is the breaking and entering of the dwelling-house of another in the night-time with intent to commit a felony therein (*m*); and by the statute law the breaking out of the dwelling-house of another in the night-time by one who has entered it with intent to commit felony or who has committed felony therein, is also declared

(*h*) See *Reg.* v. *Bowden*, 2 Mood. C. C. 285.

(*i*) As explanatory of the meaning of the phrase here used, see *R.* v. *Carroll*, 1 Mood. C. C. 89; Per *Ashhurst*, J., *R.* v. *Owen*, 2 Leach C. C 574, *R.* v. *Taylor*, Russ. & Ry. 418; *R.* v. *Hamilton*, 8 Car. & P. 49.

(*k*) See *R.* v. *Amier*, 6 Car. & P. 344; *R.* v. *Jordan*, 7 Car. & P 432.

(*l*) *Reg.* v. *Lawes*, 1 Car. & K. 62.

(*m*) A 'burglar,' according to Lord Coke, 3 Inst. 63, is he who "in the night breaketh and entereth into a mansion-house of another, of intent to kill some reasonable creature, or to commit some other felony within the same; whether his felonious intent be executed or not." A burglar is, by the common law, a felon. Id. ibid.

In burglary "as well those who actually enter the house as those who are close at hand on the outside of it, waiting to watch or to carry off the property," are guilty: Per *Alderson*, B., *R.* v. *Passey*, 7 Car. & P. 283: see *R.* v. *Jordan*, Id. 423.

to be burglary (*n*); the night-time in connection with this offence being considered as commencing at nine o'clock in the evening and as terminating at six in the morning (*o*).

In further explanation of this subject—the offence of burglary consists in the invasion of a man's dwelling-house, —1. effected by force or fraud; 2. in the night-time; and 3. accompanied with the actual commission of a felony or made with intent to commit a felony therein (*p*). First, then, subject to the statutory limitation of the word already noticed (*q*), "every house for the dwelling and habitation of man" is taken to be a 'dwelling-house' "wherein burglary may be committed" (*r*)—ex. gr. a set of chambers in an inn of court (*s*), or of apartments in a lodging-house having a separate outer door (*t*);—"burglary cannot," however, "be committed in a tent or booth erected in a market or fair, although the owner may lodge therein, for the law regards thus highly nothing but permanent edifices" (*u*).

A house in which the owner resides during the day, takes his meals, and carries on his business, but does not sleep, is not a dwelling-house within the definition of the crime of burglary (*x*); there may, however, be a construc-

(*n*) Ante, p. 978. *Reg.* v. *Wheeldon*, 8 Car. & P. 747.

(*o*) Ante, p. 978.

(*p*) Cr. L. Com., 5th Rep., p. 4.

(*q*) Ante, pp. 978-9.

(*r*) 3 Inst. 64.

(*s*) 1 Hale P. C. p. 556.

(*t*) See *Monks* v. *Dykes*, 4 M. & W. 567; *R.* v. *Eggington*, 2 B. & P. 508; 3 Inst. 65.

(*u*) 4 Bla. Com. p. 226.

See, further, as to what is or is not to be regarded as part of the dwelling-house: *R.* v. *Paine*, 7 Car. & P. 135; *Reg.* v. *Higgs*, 2 Car. & K. 322; *R.* v. *Turner*, 6 Car. & P. 407; *R.* v. *Burrowes*, 1 Mood. C. C. 274; *R.* v. *Somerville*, 2 Lew. C. C. 113; *R.* v. *Smith*, 1 M. & Rob. 256.

(*x*) *R.* v. *Martin*, Russ. & Ry. 108; *R.* v. *Flannagan*, Id. 187; and cases cited 2 East. P. C. pp. 491—499.

tive occupation by the servant or family of the owner, although the distinctions in regard to this subject are somewhat fine (*y*).

Again—there must be both a 'breaking' and an 'entering' of the dwelling-house in order to constitute the crime of burglary. And here accordingly may be noticed the distinction between a breaking sufficient to sustain an action of trespass, and one which will suffice to support an indictment for burglary—every entry into the house of another by a trespasser is a breaking in law, whereas every unlawful entry by night (*z*) into a dwelling-house is not at common law a breaking of the house sufficient to constitute the crime in question, inasmuch as the gist of this offence is—and the indictment for it charges—that the accused "*feloniously* and *burglariously* did break and enter" the dwelling-house of A. B. with intent to steal therein (*a*), or as the case may be. Hence if the door of a dwelling-house be open, and a thief enter the house with intent to steal, this is not burglary, because there is no actual breaking. So "if the window of a house be open, and a thief with a hook or other engine draweth out some of the goods of the owner, this is no burglary;" but if the thief breaks

(*y*) 2 East P. C., p. 503; *R.* v. *Wilford*, Russ. & Ry. 517; *R.* v. *Davies*, 2 Leach C. C. 876; *R.* v. *Rees*, 7 Car. & P. 568; and see the cases cited Arch. Cr. Pl., 12th ed., p. 388.

(*z*) If the breaking of the house were in the day-time and the entering in the night, or the breaking in the night and entering in the day, this will not be burglary. 1 Hale P. C., p. 551; but if the breaking be one night, with a burglarious intent, and the entering be on a subsequent night, this will suffice to constitute the crime of burglary: Id. ibid; *R.* v. *Smith*, Russ. & Ry. 417; *R.* v. *Jordan*, 7 Car. & P. 432.

(*a*) 3 Inst. 64; Hawk. P. C. Bk. 2, c. 33, s. 40. See the form of an indictment for burglary, Arch. Cr. Pl., 12th ed., p. 382.

the glass of the window, and with a hook in like manner abstracts some of the goods of the owner, this is burglary, for there was an actual breaking of the house (*b*). So "it is deemed an 'entry' when the thief breaketh the house and his body or any part thereof, as his foot or arm, is within any part of the house, or when he putteth a gun into a window which he hath broken, or into a hole of the house which he hath made, of intent to murder or kill," but "if he doth barely break the house without any such entry at all, that is no burglary" (*c*), to constitute which, as above observed, there must be both a breaking and an entry.

There may, however, be a constructive breaking of a dwelling-house effected by stratagem, fraud, or through the medium of intimidation, sufficient to sustain an indictment for burglary; for, on an act done *in fraudem legis*, an unfavourable construction will be put (*d*)—thus, to knock at the door of a house in the night-time, and, upon its being opened, to rush in with a felonious intent; or to gain admittance to a house in the night-time under pretence of taking lodgings therein, and then to fall upon the landlord and rob him; or to procure a constable to gain admittance in order to search for thieves, and then to bind the constable and rob the house,—all these entries have been adjudged burglarious, though there was no actual

(*b*) 3 Inst. 64. In regard to the question what may suffice to constitute an actual breaking? see *R.* v. *Hyams*, 7 Car. & P. 441; *R.* v. *Haines*, Russ. & Ry. 451; *R.* v. *Hall*, Id. 355; *R.* v. *Russell*, 1 Mood. C. C. 377; *R.* v. *Smith*, Id. 178; *R.* v. *Robinson*, Id. 327; *R.* v. *Jordan*, 7 Car. & P. 432, 436.

(*c*) 3 Inst. 64; 2 East P. C., p. 490. As shewing what may constitute an 'entry,' see *R.* v. *Davis*, Russ. & Ry. 499; *R.* v. *Bailey*, Id. 341; *Rey.* v. *Simpson*, 3 Car. & K. 207 n. (*a*).

(*d*) See 3 Inst. 64.

breaking; for "the law will not suffer itself to be trifled with by such evasions, especially under the cloak of legal process" (*e*).

2ndly. We have already seen, that, to support an indictment for burglary, the breaking and entering or the breaking out of the dwelling-house in question, must have taken place during the night-time as defined by the statute law. And 3rdly. In order to constitute the crime of burglary, there must be a breaking and entering of the dwelling-house of another with intent to commit some felony within the same, whether such felonious intent be executed or not. If it appear that the breaking and entering was to commit a mere trespass, we have just seen that this will not amount to burglary, the injured party being left to his civil remedy (*f*). Where, however, such a breach and entry of a house as has been above described is effected by night with intent to commit a robbery, a murder, a rape, or any other felony, this is burglary, whether the substantive offence contemplated be actually achieved or not. Nor does it make any difference whether such offence were felony at common law or created so by statute, since that statute which makes an offence felony gives it incidentally all the properties of a felony at common law (*g*). The intent in breaking and entering may indeed be presumed from the actual commission of the specific felony

(*e*) 4 Bla. Com. pp. 226--7; 3 Inst. 64; 2 East P. C., p. 485: 1 Hale P. C., p. 553.

(*f*) See the arg *Reg.* v. *Powell*, 2 Den. C. C. 405.

(*g*) 4 Bla. Com., pp. 227, 228; *R.* v. *Locost*, Kel. 30; 1 Hale P. C., pp. 549, 559; Hawk. P. C. Bk. 1, chap. 38, s. 1; 2 East. P. C., pp. 484, 519, citing *R.* v *Vandercomb*, 2 Leach C. C. 708, 3 Inst. 63.

charged (*h*), but it must be averred in the indictment and proved as laid (*i*). If, therefore, the indictment charged that the breaking and entering was with intent to steal goods and chattels, it would not be sufficient to shew that the accused broke into the house with intent to steal mortgage deeds—for mortgage deeds, being subsisting securities for the payment of money, are clearly choses in action, and as such are not properly described in the indictment as goods and chattels (*k*). So, by the common law (*l*) the stealing of chattels *personal* alone amounts to the offence of larceny; and if an indictment for that offence were to allege that goods and chattels were stolen, proof that chattels *real* were stolen would not support the indictment (*m*).

Conviction on indictment for burglary.

It remains but to add, that, on an indictment for burglary which comprehends within itself an indictment for house-breaking and usually for larceny in the house, if the jury are satisfied that there was a breaking in the night-time with intent to steal, they may convict the accused of burglary; if they should think that the breaking was not in the night-time, but that there was a breaking and goods stolen of any value, they may convict of house-breaking under the stat. 7 & 8 Geo. 4, c. 29, s. 12; or, if they should think that the evidence of the breaking is not sufficient, they may convict the prisoner of stealing in a dwelling-house to the value of 5*l.* (*n*); the rule upon this subject being,

(*h*) 1 Hale P. C., p. 559; *R.* v. *Furnival*, Russ. & Ry. 445.

(*i*) See *R.* v. *Dingley*, cited 2 Leach C. C. 841; 1 Hale P. C., p 561; *Reg.* v. *Clarke*, 1 Car & K. 421.

(*k*) *Reg.* v. *Powell*, 2 Den. C. C. 403.

(*l*) See the 7 & 8 Geo. 4, c. 29, ss. 5, 23.

(*m*) Per *Alderson*, B., 2 Den. C. C. 409.

(*n*) Per *Gaselee*, J., *R.* v. *Compton*, 3 Car. & P. 418; *R.* v. *Butterworth*, Russ. & Ry 520.

that, "in order to convict of a felony which was not the felony primarily charged it is necessary that the minor felony should be substantially stated in the indictment" (*o*).

(*o*) Per *Jervis*, C.J., *Reg.* v. *Reid*, 2 Den. C. C. 92.

CHAPTER IV.

OF THE PROCEEDINGS AT A CRIMINAL TRIAL (a).

BEFORE attempting a brief view of the proceedings at a Criminal Trial, whether it take place at the Assizes, at the Central Criminal Court, or before Judges acting by virtue of a special commission from the Crown, it may be well to remind the reader that there are cases—not a few—in which express power is given to inferior tribunals or to particular functionaries, as Recorders and others, to deal with certain kinds of offences according to their discretion, regulated and limited more or less stringently by the statute law. From amongst functionaries clothed with such discretionary powers, Justices of the Peace may, in connection with the subject of this Chapter, claim especial notice.

Justices of the peace—general view of their jurisdiction.

The power of a Justice of the Peace as a criminal judge is derived in part from his commission proceeding from the Crown, and in part from particular Acts of Parliament. Under the commission of the peace (b) the justice derives a

(a) The aim of this Chapter is rather to direct the attention of the student to certain points of practical importance connected with criminal procedure than to exhibit a complete view of it. In regard to the functions of the grand jury, the arraignment and trial, the right of challenge, judgment, the effect of a pardon, and the various kinds of punishment inflicted under the sanction of our law, the reader is referred for full information to chapters 65—68 inclusive of Mr. Warren's excellent Abridgment of Blackstone's Commentaries.

(b) Of which the form may be seen in Burn's J. P., 29th ed., vol. 3, p 988; and in Dickinson's Quarter Sessions, 5th ed., p. 65.

twofold power, first when out of sessions, and secondly when sitting in sessions, either general or petty. When out of sessions the commission empowers him singly to conserve the peace, to suppress riots and affrays, to take security for keeping the peace, and to apprehend and commit felons and other criminals. The commission of the peace also empowers any two or more justices to hear and determine all felonies and other offences, which, as Blackstone remarks (*c*), is the ground of their jurisdiction at sessions—a jurisdiction which has however been most materially restricted by the 1st sect. of stat. 5 & 6 Vict. c. 38—intituled "An Act to define the Jurisdiction of Justices in General and Quarter Sessions of the Peace,"—which enacts, that, after the passing of that Act, neither the justices of the peace acting in and for any county, riding, division, or liberty, nor the recorder of any borough, shall at any session of the peace, or at any adjournment thereof, try any person for any treason, murder, or capital felony, or for any felony which, when committed by a person not previously convicted of felony, is punishable by transportation beyond the seas for life; or for any of the following offences:—1. misprision of treason: 2. offences against the Queen's title, prerogative, person or government, or against either House of Parliament: 3. offences subject to the penalties of præmunire (*d*): 4. blasphemy and offences against religion: 5. administering or taking unlawful oaths: 6. perjury and subornation of perjury: 7. making or suborning any other person to make a false oath, affirmation, or declaration, punishable as perjury or as a misdemeanor: 8. forgery: 9. unlawfully

(c) 1 Com., p. 354.

(d) In regard to the offence of *præmunire*, see 4 Bla. Com. Chap. 8.

and maliciously setting fire to crops of corn, grain, or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern: 10. bigamy and offences against the laws relating to marriage: 11. abduction of women and girls: 12. endeavouring to conceal the birth of a child: 13. offences against any provision of the laws relating to bankrupts and insolvents: 14. composing, printing, or publishing blasphemous, seditious, or defamatory libels: 15. bribery: 16. unlawful combinations and conspiracies, except conspiracies or combinations to commit any offence which such justices or recorder respectively have or has jurisdiction to try when committed by one person: 17. stealing or fraudulently taking or injuring or destroying records or documents belonging to any Court of law or equity, or relating to any proceeding therein: 18. stealing or fraudulently destroying or concealing wills or testamentary papers, or any document or written instrument being or containing evidence of the title to any real estate, or any interest in lands, tenements, or hereditaments. Also by stat. 9 & 10 Vict. c. 25, s. 15, neither justices of the peace nor recorders shall at any session of the peace, or at any adjournment thereof, try any person for any offence under that Act, which was passed "for preventing malicious injuries to person and property by fire, or by explosive or destructive substances."

Further, it seems clear that county magistrates have by their commission jurisdiction in all indictable offences to receive the information of any individual respecting them—to grant a summons or warrant thereon to bring the accused party before them—to examine the witnesses on oath—to hear what the accused has to say in his defence—to take down the examinations in writing—and then either

to discharge the accused, to admit him to bail, or to commit him for trial (*e*):—the mode of enforcing the attendance of the party accused or suspected of crime before the justice, or of apprehending one against whom an indictment has actually been found—of compelling the attendance of witnesses before the magistrate—of conducting their examination—of taking down the depositions—of receiving the statement, if any, of the accused—of transmitting the depositions and statement to the Court in which the trial is to be had,—being minutely regulated by the 11 & 12 Vict. c. 42, intituled "An Act to facilitate the performance of the duties of Justices of the Peace out of Sessions within England and Wales with respect to Persons charged with Indictable Offences," the provisions of which statute should of course be carefully studied in reference to the due discharge of magisterial duties by those who are invested with them.

In many of the cases falling within their summary jurisdiction, justices of the peace and stipendiary magistrates have a discretionary power either to exercise their jurisdiction, or to refer the case to the sessions or assizes by committing the accused,—as, for instance, under the Juvenile Offenders Act, (10 & 11 Vict. c. 82, (*f*)), or under the Act "for diminishing Expense and Delay in the Administration of Criminal Justice in certain cases," (18 & 19 Vict. c. 126,) or under the 7 & 8 Geo. 4, c. 30, (for "consolidating and amending the Laws relative to Malicious Injuries to Property.") And from what has been above said we may infer that the jurisdiction exercised by justices of the

(*e*) Arch. J. P. 4th ed., vol. 2, p. 28; 1 Bla. Com., pp. 349, 353--4.

(*f*) See also the 17 & 18 Vict. c. 86, amended by 18 & 19 Vict. c. 87; 13 & 14 Vict. c. 87.

peace (*g*) is in some cases substituted, to all intents and purposes, for—whilst in others it is ancillary to—that of a superior tribunal. In point of fact, indeed, almost every criminal offender who appears for trial at the assizes has in the first instance been examined and committed by a magistrate in the ordinary way, having been brought before him either with or without a summons or warrant by a police constable acting on his own judgment or on the complaint of some private individual (*h*). Although cases do, nevertheless, present themselves in which the preliminary process here spoken of is altogether wanting—as where a prisoner has been committed by the coroner in pursuance of the verdict of his jury—a committal however which does not in any way oust the jurisdiction of ordinary justices—or where a supposed criminal is arrested by virtue of a warrant issued by the Privy Council or a Secretary of State (*i*) —or where an information is filed by the Attorney General ex officio, or by the Master of the Crown-office, with leave from the Court of Queen's Bench, at the instance of any individual (*j*)—or where a presentment is made by the grand jury of an offence within their own knowledge or observation (*k*)—or, lastly, where a private person prefers a bill to the grand jury, without preliminary notice, against an absent party—a mode of proceeding, however, which is neither commonly resorted to nor expedient.

Procedure by indictment.

We are told, however, in a work of authority (*l*), that pro-

(*g*) As to the jurisdiction of Borough Justices, see Arch. J. P., 4th ed., vol. 2, p. 31.

(*h*) Ante, pp. 725, 728.

(*i*) See the cases in regard to such warrants collected Toml. L. Dict., tit. "Commitment," I.

(*j*) Ante, p. 256 *n.*

(*k*) 4 Bla. Com., p. 301.

(*l*) Dickinson's Quarter Sess., 5th ed., p. 168.

secution by *indictment* is the most usual and constitutional course for bringing offenders to justice on criminal charges. The 'indictment' is an accusation preferred in the name of the sovereign to a grand jury competent by law to find it, and found by them on their oaths (*m*); this accusation, when first preferred to the grand jury, being called a bill, and being properly termed an indictment only when found by them. Now the office of the indictment being to inform the prisoner of the charge which he is called upon to answer, it might certainly, à priori, be supposed that the simpler the phraseology used, and the shorter and more free from technicality the statement of the offence charged therein, the more surely and effectually would justice be administered—the risk of its defeat being diminished in proportion as simplicity was attained. Till recently, however, the view entertained in relation to the framing of indictments in criminal proceedings seems to have differed essentially from that just stated; for the extreme certainty required, and the technical and inverted phraseology used in an indictment, as well as the multiplicity of counts inserted in it for the purpose of obviating purely formal objections, must have rendered that instrument in most cases unintelligible to the prisoner, and without doubt perpetually led, in one way or another, to the frustrating of the requirements of justice. Happily, however, the above evils have for the most part been removed, the form of the indictment has been greatly simplified, and the difficulty in drawing it correspondingly diminished, by the stat. 14 & 15 Vict. c. 100, intituled "An Act for further improving the Administration

(*m*) Dickinson's Quarter Sess., 5th ed., p 168.

As to the mode in which the bill is found or ignored by the grand jury, reference may be made to 4 Bla. Com., p 305.

of Justice," which contains several most useful provisions bearing upon the matters just indicated. In the first place, by the 24th sect. of the Act, all objections grounded on certain formal defects in the indictment specified in that section are altogether done away with, so that no advantage can henceforth be taken of them (*n*). Moreover, by the 25th sect., "every objection to an indictment for any formal defect apparent on the face thereof" must be taken by demurrer or motion to quash such indictment before the jury are sworn, and will no longer be available for the prisoner by motion in arrest of judgment or on error; and the same section further empowers the Court to amend any such formal defect when an objection is taken to the indictment on account of it.

The 1st sect. of the Act just named is also most material in relation to the better administration of criminal justice. Formerly, if a variance occurred between any allegation in an indictment and the evidence adduced in support of it, the prisoner was entitled to be acquitted, and this necessarily led to much inconvenience (*o*), which, having been partially obviated by various statutory enactments (*p*), has been, so far as is deemed consistent with justice, removed by the clause in question.

It provides, that "whenever, on the trial of any indictment for any felony or misdemeanor, there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof," in respect of any of the various matters set forth in the above section, ex. gr. in the christian or surname of any person mentioned therein, or

(*n*) See *Reg.* v. *Frost*, 1 Dearsl. 474.

(*o*) See Mr. Greaves's edit. of Lord Campbell's Acts, p. 2.

(*p*) Id. p. 3.

"in the name or description of any matter or thing whatsoever therein named, or in the ownership of any property named or described therein," the Court may, "if it shall consider such variance *not material to the merits of the case*, and that the defendant cannot be prejudiced thereby in his defence on such merits," order the indictment to be amended according to the proof, "on such terms as to postponing the trial to be had before the same or another jury," as the Court shall think reasonable;—and when the amendment in question has been made, the trial and proceedings subsequent thereto will take place "in the same manner in all respects and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had occurred." Now, with reference to the section thus briefly abstracted, one point must especially be noticed, viz. that an amendment can only be made in any of the cases therein specified, where it does not affect the merits of the case, that is to say, where it does not affect "the substantial truth and justice of the case with reference to the guilt or innocence of the prisoner" (*q*). Cases, it has been said, may easily be put, where no doubt can exist that the variance in question is not material to the merits, and where, therefore, the defendant cannot be unfairly prejudiced by an amendment. For instance, if a man steals a sheep during the night out of a field, being ignorant at the time of the name of the owner of the sheep, it could hardly be said that the owner's name would be material to the merits of the issue of 'guilty' or 'not guilty.' In each case, however, the Court must necessarily form its

(*q*) See Mr. Greaves's edit. of Lord Campbell's Acts, p. 4; *Reg.* v. *Sturge*, 3 E. & B. 734.

own judgment with reference to the facts brought before it. And the two questions for consideration before making an amendment will always be—1st, whether the variance is material to the merits of the case; and 2ndly, whether the defendant can be prejudiced by the amendment in his defence (*r*) *upon the merits;* for of course, in one point of view, he must *always* be prejudiced by an amendment, inasmuch as he might altogether escape conviction if it were not made.

The practical effect of the above statutory provision, and of some other sections (*s*) of the Act taken together, is to render much less precision and certainty necessary in framing indictments than was formerly required. Accordingly, an indictment under the new practice is generally characterised by extreme brevity and simplicity. It consists of (*t*)—

1st. The venue; which indicates the Court before which the offender is to appear, and the jurisdiction within which the offence charged was committed or is triable (*u*).

2ndly. The statement of the offence, which must contain

(*r*) Id. p. 5.

(*s*) See ss. 4—8.

(*t*) As regards the time at which a bill may be preferred and an indictment found, it will be well to observe, that, by virtue of the rule *nullum tempus occurrit regi*, this may be done, where a particular period of limitation is not prescribed by statute, at any length of time after the offence was committed.

(*u*) In *Reg.* v. *Serva*, 1 Den. C. C. 104, an important question as to the jurisdiction of criminal courts of assize was much discussed; and see *Reg.* v. *Sharpe*, 1 Dearsl. 415.

"If a man employ a conscious or unconscious agent in this country" to commit an offence, "he may be amenable to the laws of England, although at the time he was living beyond the jurisdiction." Per Lord *Campbell*, C. J., *Reg.* v. *Garrett*, 1 Dearsl. 241; Per *Parke*, B., Id. 236.

such ingredients as are essential either at the common law or by statute to constitute it. Thus, where by statute a particular act is punishable when done with a particular intent—such intent must be alleged in the indictment conformably to the statute. And in preparing an indictment for any statutable offence, care must be taken so to allege it, that it may be brought within the purview and meaning of the Act (*x*). The indictment must, further, charge the defendant directly and positively with having committed the offence thus set forth and alleged (*y*).

And 3rdly, the conclusion, with reference to which I will merely add, that, although the 24th sect. of the 14 & 15 Vict. c. 100, renders the want of a proper or formal conclusion to an indictment immaterial, yet this must not be understood as having affected the practice as to concluding the indictment *contra formam statuti*, where the offence charged in it is founded upon the statute law (*z*).

Arraignment.

Let us now assume that the bill has been duly presented to and found by the grand jury, and that the accused party is in custody, the next step in the proceedings is to *arraign* the prisoner, i. e. to call upon him when placed at the bar of the Court to answer the matter charged upon him in the indictment (*a*). On this arraignment the prisoner is re-

(*x*) As to the joinder of counts in an indictment, see Arch Cr. Pl ,12th ed., pp. 59—62. A misjoinder, as where a count for felony is joined with one for misdemeanor, may be cured by verdict of acquittal on either count: see *Reg.* v. *Ferguson*, 1 Dearsl. 427.

(*y*) Arch. Cr. Pl., 12th ed., pp. 30 et seq.

(*z*) See Arch. Cr. Pl, 12th ed., pp. 56, 57.

The reason why an indictment for a statutory offence should conclude contra formam statuti, is stated in Hawk. P. C. Bk. 2, Chap. 25, ss. 115, 116.

(*a*) 4 Bla. Com., p. 322. See *Reg.* v. *Key*, 2 Den. C. C. 347; *Reg.* v. *Shuttleworth*, Id. 351; *Reg.* v. *Clark*, 1 Dearsl. 198.

quired to plead "guilty" or "not guilty," unless indeed, as rarely happens in practice, he has some special matter of defence to urge in answer to the indictment. Of such special plea the most usual and important subject-matter now is, that he (the prisoner) has already been "lawfully acquitted or convicted of the identical felony or misdemeanor charged and specified in the indictment;" and this plea would of course, if substantiated, offer good ground of defence; for it is a principle designated, indeed, by Lord *Campbell*, C. J. (*b*), as a "sacred maxim" of our law, that—*nemo bis vexari debet pro eâdem causâ*—no man ought to be twice tried, or brought into jeopardy of his life or liberty, more than once for the same offence. The effect of the plea of autrefois acquit in connection with a particular statutory provision since repealed (7 Will. 4 & 1 Vict. c. 85, s. 11,) was much discussed in *Bird's case* (*c*), to which for additional information respecting it the reader is referred (*d*). Plea.

With the exception of the particular ground of defence just adverted to, a special plea to an indictment is little known in practice (*e*); and should the prisoner on his ar-

(*b*) *Reg.* v. *Bird*, 2 Den. C. C. 216, 222, at which latter page the learned Lord Chief Justice remarks, that "it is only the ignorant and the presumptuous who would propose that a man should be liable to be again accused after a judgment regularly given pronouncing him to be innocent. According to this novel doctrine, the Crown might a second time prosecute for high treason a person who had been acquitted of the charge by a jury of his country, and there would be no end to prosecutions for felony or misdemeanor prompted by private malevolence." See also 4 Bla. Com., pp. 335–6.

(*c*) 2 Den. C. C. 94.

(*d*) In reference to the plea of autrefois acquit, a careful perusal of the 14 & 15 Vict. c. 100, ss. 9—14, is also recommended.

(*e*) Special pleas are to the jurisdiction of the Court, or in abatement. See *O'Brien* v. *Reg.* 2 H. L. Cas. 469; *O'Connell* v. *Reg.* 11 Cl. & F.

raignment plead "not guilty" (*e*), the next step in the proceedings will be to swear the jury (*f*), which is done subject to a right of challenge to the array or to individual jurymen on the part of the prisoner or defendant and of the Crown (*g*). When the jury have been sworn the prisoner is 'given in charge' to them, the meaning of which phrase is shewn by the address of the clerk of arraigns to the jury, for, after stating the specific offence on which the prisoner stands indicted and his plea thereto, he tells them that their "charge is to inquire whether he be guilty or not guilty, and to hearken to the evidence."

Swearing the jury, &c.

Giving in charge.

Case for the Crown.

The above form having been duly observed, the counsel for the prosecution opens his case to the jury, produces evidence, and calls witnesses in support of it, whose examina

155, 165, 465, 469; and autrefois acquit, convict, or attaint, or a pardon from the Crown, is also pleadable.

The prisoner may, moreover, demur to the indictment or information, on the ground that it is "not sufficient in law." "By a *general* demurrer, the prisoner confesses all the material facts charged against him in the indictment, though in the case of a demurrer of a *special* nature, which is usually called a demurrer in abatement, it might be otherwise." *Reg.* v. *Faderman*, 1 Den. C. C. 565, 570.

(*e*) If the prisoner on being arraigned should "stand mute of malice or will not answer directly to the indictment," the Court may order a plea of "not guilty" to be entered on behalf of the prisoner by the proper officer, and the plea so entered will have the same force and effect as if the prisoner had actually pleaded the same: 7 & 8 Geo. 4, c. 28, s. 2.

(*f*) When in a case of misdemeanor the record has been removed by certiorari into the Court of Queen's Bench, a special jury may be obtained at the instance either of the prosecutor or of the defendant.

(*g*) The right of challenge and mode of exercising it are minutely considered in Arch. Cr. Pl., 12th ed., pp. 135—141. *O'Connell* v. *Reg.* 11 Cl. & F. 155; *Gray* v. *Reg.* Id. 427; *O'Brien* v. *Reg* 2 H. L. Cas. 465, 470, are important with reference to the right of challenge.

tion is conducted in accordance with certain principles, which must needs be observed and scrupulously adhered to, experience teaching us that the truth will far more often and more surely be arrived at if sought for by the aid of inflexible rules than if pursued by ingenious surmises, or traced by the light of proofs, which, though in the particular case apparently sufficient, are nevertheless shewn by experience and abstract reasoning to be deceptive and fallacious. It has been laid down, indeed, that no material difference exists, in regard to the rules of evidence, between criminal and civil procedure—that what may be received in the one case may be received in the other, and what is rejected in the one case ought to be rejected in the other (*h*)—that, in short, "a fact must be established by the same evidence, whether it is to be followed by a criminal or civil consequence" (*i*). In either mode of procedure, for instance, civil or criminal, the following rules obtain: that the proofs adduced must be relevant to the issue—that the best evidence which the nature of the case will admit of must be given—that secondary evidence will only be receivable where the best and most direct evidence cannot be had—that hearsay is not in general admissible as evidence, because the individual whose words are spoken to was not sworn nor can be submitted to cross-examination—that entries made by a person since deceased when against his own interest, or made in the usual course of business, may be received—that the Court must construe written documents, and the jury must decide upon the facts. The rules

Rules of evidence to be observed

(*h*) Per *Abbott*, J., *R.* v. *Watson*, 2 Stark. N. P. C. 155; Per *Best*, J., *R.* v. *Burdett*, 4 B. & Ald. 122.

(*i*) Per Lord *Erskine*, C., at Lord Melville's trial, 29 How. St. Tr. 764.

just stated, it will be obvious, are applicable as well in civil as in criminal Courts, whereas the following more frequently present themselves to notice in the latter—that our law presumes in favour of the innocence of an accused —that it regards the evidence of accomplices with suspicion—that a confession, whether judicial or extra-judicial, i. e. whether made before a magistrate or in Court and in the due course of legal proceeding, or made elsewhere and under other circumstances—is admissible provided it was voluntary, and must, if admissible at all, be received in its entirety (*j*)—that a dying declaration may be received in evidence on a trial for homicide, where the death of the deceased is the subject of the charge and the circumstances of the death the subject of the dying declaration (*k*).

Passing over the above-mentioned and some other rules as to the admissibility of evidence, which are peculiarly

(*j*) "By the law of England," says *Parke*, B., in *Reg.* v. *Baldry*, 2 Den. C. C. 444-5, "in order to render a confession admissible in evidence, it must be perfectly voluntary; and there is no doubt that any inducement in the nature of a promise or of a threat held out by a *person in authority* vitiates a confession;" the ground for rejecting the evidence when so obtained being, that "it would not be safe to receive a statement made under any influence or fear." Per *Pollock*, C. B., Id. 442.

It is for the Judge who presides at the trial to determine whether a confession tendered in evidence is admissible or not, but it is further material to observe, that the onus of satisfying his mind that it was *not* made under the influence of a threat or of an improper inducement, lies on the prosecution; and if this point is left doubtful, the evidence offered will certainly be rejected; *Reg.* v. *Warringham*, 2 Den. C. C. 447, n.

As to the question who is "a person in authority" within the meaning of the rule above laid down, see *Reg.* v. *Moore*, 2 Den. C. C. 522, and cases there cited; *Reg.* v. *Sleeman*, 1 Dearsl. 249; *Reg.* v. *Luckhurst*, Id. 245; *Reg.* v. *Laugher*, 2 Car. & K. 225.

(*k*) Per *Abbott*, C. J., *R.* v. *Mead*, 2 B. & C. 608.

applicable in criminal inquiries, I may observe, in the words of *Eyre*, C. B. (*l*), that,—although "the *most common* and ordinary species of legal evidence consists in the depositions of witnesses taken on oath before the jury, in the face of the Court, in the presence of the prisoner, and received under all the advantages which examination and cross-examination can give;" besides this kind of proof and certain species of hearsay evidence (some whereof have been above alluded to), which are, for various reasons, admitted by law;—the examination of a prisoner and the depositions of the witnesses who may be produced against him, taken officially before a justice of the peace by virtue of the statute law, may, under certain circumstances, be substituted for vivâ voce testimony. As to the admissibility, accordingly, and use of the depositions and statements of the accused as evidence at his trial, a few remarks may here, by reason of the practical importance of the subject, conveniently be offered. The 11 & 12 Vict. c. 42, s. 17, provides that the deposition, duly taken in conformity to the Act, of any witness, who, at the time of the trial, may be dead, or "so ill as not to be able to travel" (*m*), may be read as

Admissibility of depositions in evidence.

Dying declarations, says *Eyre*, C. B., in *R.* v. *Woodcock*, 1 Leach C. C. 502, are made in extremity when the party making them is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth: a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of justice. See also per Cur. *R.* v. *Drummond*, 1 Leach C. C. 337; *Tinkler's case*, 1 East P. C. 354.

"It may be doubted whether dying declarations would be receivable in any civil case, except perhaps where the inquiry involved the cause of death of the declarant:" 1 Phill. Evid., 10th ed., p. 241; *Stobart* v. *Dryden*, 1 M. & W. 615; *Aveson* v. *Lord Kinnaird*, 6 East, 188.

(*l*) *R.* v. *Woodcock*, supra.

(*m*) See *Rex.* v. *Riley*, 3 Car. & K. 116.

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evidence in such prosecution, if proved to have been taken in the presence of the accused, and if it be shewn that he or his counsel or attorney had a full opportunity of cross-examining the said witness; and further, if the deposition purport to be signed by the justice—by or before whom the same purports to have been taken—no further proof of the deposition being requisite, "unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same" (*n*). Besides being receivable in the event of the death or illness of a witness, the case of *Reg.* v. *Scaife* (*o*) shews also, that, where the prisoner or one of the prisoners (if there be several in the indictment) has resorted to a contrivance to keep a witness out of the way, his deposition will be admissible as against that party only who procured his absence. But no case has decided that a deposition would be receivable merely because the witness could not be found, and on principle this would appear not to be so. And even in the case of illness of a witness, his deposition will be admissible in evidence against the accused only where the charge preferred at his trial is the same as that made before the committing magistrate, or, if not technically the same, where the prisoner has had full opportunity of cross-examining the witnesses called against him (*p*).

Again, it is positively required by the statute 11 & 12 Vict. c. 42, s. 17, that the committing magistrate shall have the examination before him of an accused person taken down in writing—a neglect to comply with this requisition

(*n*) See *Reg.* v. *Clements*, 2 Don. C. C. 251.

(*o*) 17 Q. B. 238, 243

(*p*) *Reg.* v. *Ledbetter*, 3 Car & K 108; *Reg.* v. *Beeston*, 1 Dearsl. 405, and cases there cited

being quite illegal (*q*)—and if so taken down, the depositions cannot at the trial be added to, contradicted, or explained by *parol evidence* of what passed before the justice. There is, however, no hardship on the prisoner in acting upon this rule, for the deposition is always read over to him, and he has thus an opportunity afforded him of insisting that any material omission therein shall be supplied and put down in writing (*r*).

The depositions, then, against an accused person will, under the circumstances above specified, be good evidence, at his trial, for the prosecution. And here a question—important with reference to the right to the reply—arises, viz. whether or not the counsel for the prisoner is entitled to cross-examine upon the depositions without putting them in evidence. Now the settled rule upon this subject is (*s*), that where a witness for the Crown has made a deposition before a magistrate, he cannot in cross-examination be asked whether he did or did not in his deposition make such or such a statement until the deposition itself has been read, in order to shew whether such statement is contained in it; and if so read, the deposition will then become part of the evidence for the defence, so that the counsel for the prosecution will be entitled to reply. According to the established practice, however, the depositions and the statement of the prisoner (*t*) are thus far treated as distinct, that, by putting in the latter, the counsel for the prosecu-

(*q*) Per *Jervis*, C. J., *Parsons* v. *Brown*, 3 Car. & K. 296.

(*r*) Phill. Evid., 10th ed., vol. 2, p. 106.

(*s*) See 7 Car. & P. 676; *Reg.* v. *Ford*, 2 Den. C. C. 245

(*t*) That is, the statement, if any, of the accused taken down, after a proper caution, by the committing magistrate. See the 11 & 12 Vict c. 42, s. 18; *Reg.* v. *Sansome*, 1 Den. C. C. 145, 148; *Reg.* v. *Bond*, 3 Car & K. 337, n

tion does not entitle the prisoner's counsel to cross-examine upon the former without giving him a right to the reply (*u*).

Case for the defence.

Upon the case for the prosecution being closed, and by way of answer to the evidence given in support of it, the prisoner's counsel will address the jury, calling witnesses and adducing documentary evidence to substantiate his defence, if necessary; and should he offer evidence, the counsel for the prosecution may reply; and even where the only evidence called on the part of the prisoner is evidence to character, although the counsel for the prosecution is entitled to reply, it is a matter for his discretion, whether he will use this right or not, though cases may occur in which it will be fit and proper so to do (*x*). And in any public prosecution for felony (*y*), or misdemeanor (*z*), instituted by the Crown, its law-officers and those who represent them are in strictness entitled to the reply, although no evidence on the part of the prisoner be offered.

And now let us suppose that the case on both sides has been closed, the evidence summed up, the law applicable to it laid down by the Judge, and the verdict given (*a*), the next point of practical importance to notice is with respect to the mode in which the judgment should be entered. As to this, of course, no difficulty can be felt where the indictment consists of one count only, but where it contains several counts, charging different offences, with regard to

Judgment.

(*u*) *R.* v. *Pearson*, 7 Car. & P. 671; Per *Parke*, B., *Reg.* v. *Aylett*, 8 Id. 670.

(*x*) 7 Car. & P. 677.

(*y*) Id. ibid.; *Reg.* v. *Gardner*, 1 Car. & K. 628.

(*z*) *R.* v. *Marsden*, Mood. & Mal. 439.

(*a*) A mistake in delivering the verdict may be corrected within a reasonable time: *Reg.* v. *Vodden*, 1 Dearsl. 229.

A discharge of the jury is not equivalent to an acquittal: *Re Newton*, 13 Q. B. 716.

the goodness of some or one of which a doubt is entertained, and the verdict is returned generally, the judgment should be entered on the good counts only, for otherwise it might be reversed on writ of error (*b*). Though, now, it is, by the 11 & 12 Vict. c. 78, s. 5, provided, that whenever any writ of error shall be brought on any judgment on an indictment in any criminal case, and the Court of error shall reverse the judgment, it shall be competent for such Court either to pronounce the proper judgment, or to remit the record to the Court below, in order that such Court may pronounce the proper judgment upon such indictment (*c*).

The safe and proper course, however, for adoption where the indictment on which a conviction has been had contains counts of doubtful validity, is for the Court to pronounce judgment on each separate count of the indictment (*d*), and to have such judgment entered accordingly, in which case the punishment awarded will not be cumulative; and, if one of such judgments be reversed on error, the others will remain unaffected by such reversal (*d*); or a nolle prosequi may be entered as to all the doubtful counts

(*b*) *O'Connell* v. *Reg*, 11 Cl. & F. 155; in which case the judgment of Lord *Denman*, C. J., should be specially perused; *Campbell* v. *Reg.*, 11 Q. B. 799, 813, 814, 837; *Ryalls* v. *Reg.*, Id. 781, 795.

(*c*) "In the case of an indictment with some good and some bad counts, after a verdict for the Crown upon all the counts, the Court below ought to arrest the judgment on the bad counts, and pass sentence on the good ones." Should the Court below, however, have pronounced judgment generally, "the Court of error may now order judgment to be arrested on all the bad counts, and pronounce the proper judgment on all the good counts." Per Lord *Campbell*, C. J., *Holloway* v. *Reg.*, 2 Den. C. C. 295.

(*d*) See *King* v. *Reg.*, 14 Q. B. 31. In *O'Brien* v. *Reg.*, 2 H. L. Cas. 465, 470, it is said that sentence was distinctly repeated as to each of the five counts of the indictment on which the defendant had been convicted. See also *Gregory* v. *Reg.*, 15 Q. B. 974.

of the indictment, and judgment may be entered up on such counts only as are unquestionably good (*e*); and a misjoinder of counts will be cured by a verdict of acquittal on the count misjoined (*f*).

It has been already observed, that, by the 14 & 15 Vict. c. 100, s. 25, every objection to an indictment for any *formal* defect, although ground of demurrer, if taken at the proper time, viz. before the jury are sworn, may be amended by the Court; defects of *substance*, however, may still be taken advantage of, where not cured or amended, by motion in arrest of judgment, which is made after verdict and before judgment pronounced (*g*); or, if apparent on the record, by writ of error (*h*); and for misdemeanor, a new trial is sometimes granted, ex. gr. on the ground of surprise (*i*), or a bill of exceptions to the ruling of the judge will lie (*j*). Of a writ of error, indeed, the full effect is now attainable (*k*) by a much more speedy and less expensive process under the provisions of the stat. 11 & 12 Vict. c. 78, intituled "An Act for the further Amendment of the Administration of the Criminal Law," by virtue of which a Court of Criminal Appeal has been established for determining any question

Court for Crown Cases Reserved.

(*e*) *Reg.* v. *Rowlands*, 2 Den. C. C. 364.

(*f*) *Reg.* v. *Ferguson*, 1 Dearsl. 427.

An indictment, when so defective that no judgment can be given on it, may be quashed on certiorari, but after verdict the indictment must be construed *ut res magis valeat quam pereat*: Per *Wightman*, J., *Reg.* v. *Craddock*, 2 Den. C. C. 34; *Reg.* v. *Stokes*, 1 Den. C. C. 307.

(*g*) See *Reg.* v. *Rowlands*, 2 Den. C. C. 364; *Reg.* v. *Larkin*, 1 Dearsl. 365; *Reg.* v. *Harris*, Id. 344; *Reg.* v. *Inhabs of Denton*, Id. 3

(*h*) See *Sill* v *Reg.*, 1 Dearsl. 132. The Attorney-General's fiat, however, is necessary before bringing error on a judgment for a misdemeanor: *Ex parte Newton*, 4 E. & B. 869; *Reg.* v. *Stokes*, 1 Den. C. C. 307.

(*i*) *Reg.* v. *Whitehouse*, 1 Dearsl. 1.

(*j*) See *Reg.* v. *Alleyne*, cited Arch. Cr. Pl., 12th ed., p. 143; *S. C.* (in error), 1 Dearsl. 505.

(*k*) That is, provided the Judge chooses to grant a 'case' for the consideration of the Court of Criminal Appeal.

of law which, in the discretion of the judge who presides at the trial of a criminal offender, may be reserved by him for their consideration. The question or questions thus reserved are, under sect. 2 of the Act just cited, to be stated in a case signed by the judge, together "with the special circumstances upon which the same shall have arisen;" and this case is then to be transmitted to and argued before the Court of Criminal Appeal, who will deliver judgment thereupon. The nature and precise extent of the jurisdiction of the Court for the consideration of Crown Cases Reserved will more distinctly appear on examination of the authorities below cited (*l*).

Pardon—absolute.

Lastly, when judgment—unimpeachable on any substantial ground—has been passed upon an offender, nothing can absolve him from the penalties indicated thereby, save only endurance of the same, or a pardon, the right to vouchsafe which is, according to our constitution, the peculiar prerogative of the Crown—the fountain not only of honour but of mercy. The effect of a pardon, if absolute and unconditional, is to make the offender a new man, to acquit him of all corporal penalties and forfeitures annexed to the particular offence, and to give him a new credit and capacity (*m*).

—conditional.

A pardon, however, may be, and very frequently is, conditional only, in which case it operates to purge the particular offence upon performance of the condition, i. e.

(*l*) *Reg.* v. *Webb*, 1 Den. C. C. 338; *Reg.* v. *Faderman*, Id. 565; *Reg.* v. *Harris*, 1 Dearsl. 344.

(*m*) 4 Bla. Com. p. 402. "Where the rigour of law bordereth upon injustice, mercy should, if possible, interpose in the administration." Fost. Disc. Hom. p. 264, and Disc. High. Treas. 184. Pardon by the Crown and its consequences are fully treated of in 4 Bla. Com. chap. 31.

upon suffering the punishment imposed in lieu of the original penalty by the Crown (*n*).

AND here these Commentaries which have been devoted to an examination, more or less detailed, of each of the three leading branches of our Common Law—Civil, Quasi-Criminal, and Criminal—must conclude: not indeed for lack of matter—inasmuch as many topics, which might with propriety have been discussed, have been altogether passed over or but slightly handled—rather for lack of space—those limits having been reached, which, at the outset of this Work, it was deemed advisable should not be exceeded. On a perusal of the foregoing pages, some such ideas as the following may, perchance, have been awakened in the reader's mind:—'Assuredly the object and the aim of law are of the highest and most momentous importance—*quid sit jus et in quo consistit injuria, legis est definere.* No science, save indeed that which concerns itself with purely moral precepts, can be more elevated than *this*, whose function it is, pro bono publico, to discriminate between right and wrong—to weigh with nicest scales—to classify and punish the infinitely various infractions of that social compact to which its protection has been pledged.'—Such being the aim and office of our Common Law, how may we estimate its principles? A merely casual glance at them will shew that they are based in truth

(*n*) See the proceedings in *Smith O'Brien's case*, and the Declaratory Act (12 & 13 Vict. c. 27), passed in consequence of his rejection of a conditional pardon, as narrated in Townsend Mod. St. Tr. vol. 1, p. 469.

and justice—a more profound acquaintance with them would convince how admirably they are adapted and adjusted to the changing wants and exigencies of society. The doctrines enunciated by Roman jurists—modified conformably to the requirements of more polished manners and more elevated views—are still blended and incorporated with our law; from this land they have spread to transatlantic regions, and the deference yielded to them throughout realms thus civilised and vast, testifies to the wisdom whence they sprung. True, these principles are sometimes artificially expounded—practically misapplied—or lost in technicalities. But in the abstract they are sound—will readily adapt themselves to advancing knowledge, and to every onward step in that great career of improvement which man has yet to make. In this sense, then, we may safely predict that they will be ETERNAL.

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